THE

LAW QUARTERLY REVIEW.

No. XLVI. April, 1896.

NOTES.

San Paulo Railway Co. v. *Carter*, '96, A. C. 31, 65 L. J. Q. B. 161 finally establishes that where a company residing in the United Kingdom there carries on a trade, the whole of the gains accruing to the company, even though they be the result of transactions (e. g. sales) taking place in a foreign country, are assessable to income tax.

The principle of this case at bottom is that where a company or an individual resides in the United Kingdom, and thence directs the whole of a trade or business, the trade or business is in effect carried on in the United Kingdom, even though the dealings from which gain is made take place in a foreign country, and that therefore the whole profits of the business are chargeable with income tax.

On careful consideration of the Income Tax Acts, it will be found that two principles govern the liability under schedule (D) of the annual profits of a trade or business to income tax.

The first is that all profits are liable to income tax which arise from the carrying on of a trade or business in the United Kingdom.

The second is that all profits are liable to income tax which, though they arise from a business wholly carried on abroad, are remitted to and received by a person resident in the United Kingdom.

The practical result may be thus stated:

1. *X*, whether a company or an individual, resides in the United Kingdom, and thence directs and carries on a trade or business. All the profits of such trade are liable to income tax, even though they arise from transactions (e. g. sales) taking place out of the United Kingdom, and even though they are not transmitted to or received by *X* in the United Kingdom (*San Paulo Railway Co.* v. *Carter*, '96, A. C. 31, 65 L. J. Q. B. 161; *Imperial Continental Gas Co.* v. *Nicholson*, 1 Ex. D. 428).

2. *X*, a foreigner, resides in a foreign country, and thence directs and carries on a trade or business. Part of the gains of such trade

or business arise from transactions, (e.g. sales) taking place in the United Kingdom. Such gains are assessable to income tax (*Pommery* v. *Apthorpe*, 56 L. J. Q. B. D. 155; *Werle* v. *Colquhoun*, 20 Q. B. Div. 753; *Erichsen* v. *Last*, 8 Q. B. Div. 414; *Grainger* v. *Gough*, '95, 1 Q. B. (C. A.) 71).

3. *X* resides in the United Kingdom. Profits accrue to him from a trade or business not carried on or directed by himself, but carried on wholly in a foreign country. Half such profits are remitted to and received by him in the United Kingdom. This half of the profits is chargeable with income tax (see *Colquhoun* v. *Brooks*, 14 App. Cas. 493).

What is particularly to be noted is that whilst the whole of the profits arising from a business directed, and in that sense carried on by a person who resides in the United Kingdom are chargeable with income tax, even though they result from transactions taking place in a foreign country, the profits arising from a business directed, and in that sense carried on or exercised by a person residing in a foreign country, if they are the result e.g. of sales taking place in the United Kingdom, are also assessable to income tax. To take a concrete case, an English brewer living in England, and thence directing his business, is taxed on profits made by the sale of beer in France; but a French wine merchant living in France and thence directing his business, is also taxed on profits made by the sale of champagne in England. The brewer is looked upon as carrying on the whole of his business in the country where he resides. The wine merchant, though residing in France, is looked upon as exercising or carrying on part of his business in England.

Last year we ventured to doubt whether the decisions of the Court of Appeal which had overruled *Labouchere* v. *Dawson*, L. R. 13 Eq. 322, would be supported when *Trego* v. *Hunt*, '95, 1 Ch. 462, 64 L. J. Ch. 392, came before the House of Lords. The House has now ('96, A. C. 7, 65 L. J. Ch. 1) reversed the decision of the Court of Appeal and restored the rule, which is certainly more in accordance with natural justice and the convenience of business, that a vendor of goodwill, though free to compete with the purchaser, may not so far derogate from his own grant as to canvass the old customers personally. We have only to regret, as some at least of the Lords of Appeal did, that it was too late to lay down a still broader rule.

X & Co. take into their employment a manager to whom they are to pay a salary of £4,000 a year, with liberty to commute the same on paying a gross sum calculated in the way specified in the

agreement. The company pay to their manager the gross sum of £55,000, calculated in accordance with the agreement, and dismiss him from their service. *X & Co.* then claim to deduct the £55,000 from the profits assessable to income tax. The claim of the company is not, in the opinion of the Court of Appeal, maintainable. This is the effect of *Watson* v. *The Royal Insurance Co.*, '96, 1 Q. B. 41 (C. A.), 65 L. J. Q. B. 132. Some of our readers will, it may be expected, fancy that the Court of Appeal has made a mistake. It seems at first sight a paradox that whilst the salary paid to *X & Co.'s* manager could certainly be deducted from *X & Co.'s* assessable profits, the sum paid in commutation of the salary due to him cannot be deducted. Yet the decision of the Court of Appeal is, we conceive, right. That this is so will be apparent to any one who will keep in mind the following two facts which are constantly forgotten by persons wishing to escape payment of income tax.

1. The sums which under schedule (D) are assessable as the annual profits of a trade or business would often not be treated as profits either by a trader or by an economist. The plain truth is, that under the Income Tax Acts the gross receipts accruing to any one from a business are, subject only to certain definite deductions allowed in the Income Tax Acts, assessable to income tax, and that in calculating a person's profits for the purpose of assessment no deduction can be made which is not expressly allowed by the Income Tax Acts.

2. Under 5 & 6 Vict. c. 35, s. 100, sched. (D), cases 1 & 2, r. 1, a tradesman may deduct from his taxable profits deductions which are 'wholly and exclusively laid out and expended for the purposes of [his] trade,' or in other words, he may deduct sums expended wholly for the purpose of earning the profits which are the subject of the tax, but may not deduct other expenditure.

Now the annual salary paid by *X & Co.* to their manager was a payment made for the purpose of earning their profits, and therefore was not assessable to income tax, but the lump sum of £55,000 paid for the purpose of dismissing him from their service was not a sum expended for the purpose of earning profits, and therefore was chargeable with income tax.

Watson v. *The Royal Insurance Co.* suggests a question which the case does not appear precisely to decide. Let us suppose that *X & Co.* employed a manager *A*, and instead of paying him £4,000 a year, paid him a lump sum of £55,000 down in consideration that he should, without any further payment, serve the company for say ten years. Could they deduct the £55,000, or any part thereof, from the annual profits assessable to income tax? It could

not, on the one hand, be disputed that the sum was equivalent to a yearly payment, and that if it had not been paid to the manager the company must have paid to him, or some one else, an annual salary which would have been deductable from their assessable profits. But on the other hand, it is hard to maintain that any part of the £55,000 could be treated as money laid out and expended for the purpose of earning the annual profit. On the whole, *Watson* v. *The Royal Insurance Co.* certainly suggests that a lump sum paid in lieu of annual payments can, under no circumstances, be deducted under schedule (D) from the assessable profits of a business.

Servants of the Crown, civil as well as military, except in special cases where it is otherwise provided by law, hold their offices only during the pleasure of the Crown.

This is the broad principle of constitutional law which is laid down with great clearness in *Dunn* v. *The Queen*, '96, 1 Q. B. (C. A.) 116 and *Mitchell* v. *The Queen*, ibid. 121.

These cases suggest at least three observations.

1. It is curious that the Courts should be called upon at this time of day to reaffirm a principle the existence of which is proved by the whole course of English history. The legal steps by which the independence of the Bench has been secured are in themselves sufficient proof that prima facie a servant of the Crown, be he a Secretary of State, a military officer, or a consul, holds office during the pleasure of the Crown, and therefore can at any moment be dismissed by the Crown.

2. The maintenance of the authority of the Crown to dismiss any official is absolutely necessary in order to secure the efficiency of the public service.

3. The prerogatives of the Crown tend more and more, as has often been pointed out, to become the privileges of the House of Commons. A minister in command of a large and obedient majority might, without breach of law, so exercise the Crown's power of dismissal as to import from the United States into England the disastrous maxim 'to the victors belong the spoil.' The virtual independence secured to the civil, and even to the military servants of the country, as long as they loyally discharge their duties, is guarded by public opinion rather than by law. It is therefore of the highest importance that opinion should on this matter be kept as sound as it is in the main at the present moment. *Dunn* v. *The Queen* will do good service if it impresses on all thoughtful persons the fact that we must trust to opinion and not to law for preserving the independence of the servants of the Crown.

T dies domiciled in England in 1892, possessed of large personal estate, consisting (*inter alia*) of £400,000 invested in mortgages of land in New Zealand. *T* has by his will bequeathed to his wife one-fourth of his personal estate. His wife, who survives *T*, leaves such one-fourth of *T's* personal estate to her executors upon trust for sale and conversion. On her death in 1893 her executors claim that, in estimating the value of her personal estate for purposes of probate duty, they have a right to exclude from her one-fourth share of *T's* personal property the whole of the New Zealand mortgage securities. It is held by the Queen's Bench Division that the executors have a right to make such deduction: *Attorney-General* v. *Sudeley*, '95, 2 Q. B. 526. It is held by the Court of Appeal, *dissentiente* Lord Esher, that the executors have not a right to make the deduction, and that the whole of the one-fourth share of *T's* personal estate is liable to probate duty: *Attorney-General* v. *Sudeley*, '96, 1 Q. B. 354 (C. A.).

With regard to this case the following points should be noted:

1. The judges of the Queen's Bench Division and all the judges of the Court of Appeal agree that no property is liable to probate duty which at the time of the death of the owner is not situate in England.

2. They further apparently agree in holding that money invested on mortgages of real estate in New Zealand is to be looked upon as personal property situate in New Zealand.

3. The difference between the judges of the Queen's Bench Division and the Master of the Rolls, on the one hand, and the majority of the Court of Appeal on the other, lies in the different view which they take of the nature of the property possessed by *T's* wife at her death. According to the judges of the Queen's Bench Division and Lord Esher, she was possessed of part of the mortgage securities in New Zealand, or, in other words, a share in property situate in New Zealand, which, because it was situate in New Zealand, was not liable to probate duty. According to the majority of the Court of Appeal, she did not possess any part of the mortgage securities; her property consisted in effect of the right to receive from *T's* executors one-fourth part of his personal property when collected or got in by them. Whether such property originally consisted of money in England or securities in New Zealand is, from this point of view, a matter of indifference; the wife's personal property must be looked upon as a claim to be paid money due to her from *T's* executors, or, in other words, as a debt due to her from English debtors, and therefore liable on her death to probate duty.

In *Smith* v. *S. E. R. Co.*, '96, 1 Q. B. 178, C. A., we have a level crossing case, the first now for a considerable time. An attempt to show that rather ambiguous facts should have been withdrawn from the jury failed, as it deserved to fail. There was some incidental discussion of the question whether the plaintiff in an action for negligence is bound to prove in the first instance that he was free from contributory negligence. Our own opinion is that this doctrine is an American heresy due to the mischievous statutory (sometimes even constitutional) rule by which, in many States, the Court is forbidden to express any opinion to the jury on questions of fact. This has caused advocates to spend infinite pains and subtilty on trying to make the Court lay down as propositions of law what are really inferences of fact, so as to furnish grounds for an appeal. It is rather like the mediaeval history of special pleading over again. Here we have no occasion for these refinements. Kay L. J. (at p. 189) regards the question as still open, but inclines to the better opinion, as we humbly conceive it to be, that 'a party is not ordinarily bound to prove a negative,' i. e. the absence of negligence on his own part. Of course this may be put no less plausibly as an affirmative, that he was exercising due care. But we doubt whether the question is really open at all after Lord Watson's judgment in *Wakelin's* case (12 App. Ca. at p. 47).

It is said that *Gas Float Whitton*, No. 2 ([1896] P. 42), is to be appealed. The Court of Appeal, reversing the Divisional Court, has decided that salvors of a gas buoy or floating beacon, picked up adrift in the estuary of the Humber, have no right to salvage, upon the ground that salvage is payable only in respect of ships or their cargoes. If the case goes to the House of Lords, one question to be considered will be whether the right to salvage is anything more or less than a modification of the ancient law of the Admiralty as to 'findalls.' By that law, the finder of anything picked up at sea without an apparent owner was entitled to half 'halvendele' of his findall, and the Admiral was entitled to his 'shyre,' namely, the other half. This was the law of the Admiralty for centuries, and is referred to by Lord Stowell, when discussing the quantum of salvage to be awarded in the case of derelict. The right of the finder or salvor stands upon precisely the same footing as the right of the Crown; and the theory that Admiralty droits belong wholly to the Crown is a fiction of modern times. As to what was and what was not a findall, the records of the Admiralty show that besides ships and things that presumably came out of ships, a feather-bed, a table, fishing nets, oyster 'swadds' (baskets), royal fish, and anchor buoys have been presented at Admiralty Sessions and

dealt with as findalls, the finder taking one half and the Admiral the other; and the records will be searched in vain for any scrap of evidence that a salvor has ever been deprived of his halvendele because his findall was not a ship or part of a ship or of her cargo. Dead men's clothes and valuables did, indeed, belong wholly to the Crown, or to the Admiral its grantee, for the good of the dead man's soul; but even then the finder was allowed a recompense if he buried the corpse. This ancient right of the finder of goods at sea has been strangely whittled away and lost sight of, whilst the right of the Crown has been as steadily preserved and magnified. So much so that when, in recent times, Admiralty droits were transferred to the Consolidated Fund, the right of the salvor was altogether ignored, and it was deemed necessary to reserve a power for the Crown to grant him a reward. It may be that the old law of findalls is obsolete; if so, it would seem to be obsolete only so far as the modern law of salvage has taken its place. The right of a salvor of something that was not a findall, and that was not legal wreck, to claim against the property salved or its owner, is, like the rule against perpetuities and the married woman's separate use, an invention of the judges, and is not older than the end of the sixteenth or beginning of the seventeenth century. Before that time, Admirals and Vice-Admirals enjoyed the chief part of whatever profit was to be got from salving other people's property, the actual salvors being employed to do the work and paid by them for work and labour. When, in the time of Sir Henry Marten, judge of the Admiralty in the early part of the seventeenth century, salvors established their right to sue in Admiralty for salvage, the innovation was resented by the Vice-Admirals as diminishing their emoluments.

The decision in the *Gas Float* case as it stands will not encourage tug owners and watermen to exert themselves in picking up lighters adrift in the Thames, where, in weather such as we had last winter, they frequently part their moorings, and unless promptly secured may do great mischief. The ancient and laudable industry of sweeping for anchors has already been almost killed by the cutting down of salvage and the claims of receivers of wreck, the work being no longer remunerative.

'I protest,' says Lord Esher, 'against being asked, upon some new discovery as to the law of innkeeper's lien, to disturb a well-known and very large business carried on in this country for centuries' (*Robins* v. *Gray*, '95, 2 Q. B. (C. A.) 501, 503, 65 L. J. Q. B. 44). These words are the introduction to an admirable judgment which places, or rather keeps, the law as to an innkeeper's

lien upon a clear and intelligible basis. He has a lien upon all goods which a traveller brings to the inn as luggage, and which the innkeeper is therefore bound to receive in his inn. His privileges and his liabilities are exactly correlative.

Lord Esher's protest, further, has a very wide application. It is in substance a salutary warning against all attempts to cut down a well-known rule of common law by the introduction of exceptions founded on subtle refinements. It may or may not be desirable that an innkeeper should have a lien on the luggage brought by his guests. Whether he should possess the lien is a fair question for Parliament. What is clearly undesirable is that his rights should be uncertain. Reformers or innovators need to be constantly reminded that one great quality of a good rule of law is its clearness and its breadth.

British Wagon Co. v. *Gray*, '96, 1 Q. B. 35, 65 L. J. Q. B. 75 (C. A.) precisely marks the limits of the principle, which is often misunderstood, that in a civil case a defendant can give a Court jurisdiction by submission thereto. *X*, domiciled in Scotland, enters into a contract with *A*, under which it is agreed that in an action for the breach of the contract *X* may be served with a writ in Scotland. *X* breaks the contract, and the judge refuses to allow service in Scotland on *X*. The Court of Appeal holds that service could not be allowed, and the Court of Appeal is clearly right. Under Order XI, r. 1 (e), the Court is, in effect, forbidden to allow service in an action for breach of contract on a defendant domiciled in Scotland, and no agreement between individuals can empower the Court to do an act which it is by rules made under a statute forbidden to do. To look at the same thing from another point of view, the service of an English writ in Scotland is, under certain circumstances, forbidden on grounds of public policy, and no contract between *X* and *A* can make it politic or lawful.

Hardaker v. *Idle District Council*, '96, 1 Q. B. 335, C. A., enforces the principle that both natural persons and corporations, when they are under a duty to the public to perform something with proper skill and care, cannot avoid any part of that duty by delegating it to a contractor, whatever care may have been taken to find a contractor who was competent. The fact that the contractor was not a servant is as irrelevant as it would be on the question whether an express contract had been fulfilled or not. The development of the law in this class of cases within a generation (see *Indermaur* v. *Dames*, L. R. 2 C. P. 311) has certainly been

remarkable, but we believe it is generally accepted as just and sound.

In *Exchange Telegraph Co.* v. *Gregory & Co.*, '96, 1 Q. B. 147, the Court of Appeal went rather near to holding, and apparently the Master of the Rolls would have held if necessary, that there is a right of property in exclusive and unpublished information apart from the form in which it is expressed. Careful attention to the facts and judgments will show, however, that this was not decided. The same case shows that the damage which is the gist of an action for maliciously procuring breach of contract need not be proved in detail. It is enough if the facts proved show that actual and substantial damage is a natural result. This is perhaps a step in advance; in any case it makes for justice and good faith.

A mortgagee has a great many rights, but even a mortgagee may put his rights too high, and the plaintiff in *In re Bell, Jeffery* v. *Sales* ('96, 1 Ch. 1, 65 L. J. Ch. 188, C. A.) did so: for being mortgagee for £400 only upon a fund of £1,000 vested in trustees he wanted the whole. The words expressly are, he argued like Shylock, an 'assignment.' I claim an assignment of the whole fund and I will administer it. The trustees had notice of subsequent incumbrances, and as stakeholders they naturally declined to hand it over, and the Court held they were right. The ingenuous reader of the Law Reports wonders how a case like this—the traditional ass's shadow—comes into Court; but the mystery melts away when we remember that administering a fund is a profitable industry. The true contest is which side shall have—the milking of the cow.

Once upon a time a gentleman promised to marry a lady on his father's death, and then in despite of his promise married another lady while his father was still alive. The forsaken fair one elected for instant reparation in damages. The gentleman thereupon—inspired by the special pleader—pleaded that she must wait till his father's death; he, the promisor, might then be a widower; peradventure he might have himself crossed the Styx: but the Court of Exchequer Chamber held that the just and convenient course was to fix the damages at once: they would only be aggravated by waiting (*Frost* v. *Knight*, L. R. 7 Ex. 111), and this view was followed in *Roper* v. *Johnson* (L. R. 8 C. P. 167). In the recent case of *Roth & Co.* v. *Taysen, Townsend & Co.* (1 Commerc. Cas. 240, since affirmed (C. A.) 12 Times L. R. 211), Mathew J. has held that if a buyer repudiates before the time for delivery the seller ought, if he treats the repudiation as a breach, at once to

take reasonable steps to mitigate the loss by going into the market, and damages must be assessed on that footing. This case is a good instance of the wisdom of the rule, for the loss at the date of repudiation would have been £680 only, at the date of delivery it was £3,807. Curiously the same point has lately come before Vaughan Williams J. in *In re South African Trust & Finance Co.* (not yet reported), where an option to take shares was given by a company which went into voluntary liquidation, with a view to reconstruction, before the option became exerciseable. Vaughan Williams J. fully recognized the obligation not to sit still and let damages accumulate, but thought it would be too much to require the option holder to go into the market and enter into a speculative contract for shares.

[A specially learned contributor sends the following note, with which, it will be seen, we cannot wholly agree.]

'This case is a very remarkable one.' From this dictum of Gorell Barnes J. no one will dissent. The gist of the case is thus summed up by his lordship: 'The petitioner's case is, "I never intended to marry this man; I thought I was being betrothed to him"—certainly it is remarkable that a person of any education should have thought such a thing, but I can only judge by her manner—"and I submitted to be betrothed only because my mother and he forced me to do so."' The petitioner in *Ford* v. *Stier*, '96, P. 1, from a report of which these words are taken, was at the time of the alleged marriage seventeen years of age, and of full intellectual capacity; the marriage was celebrated in accordance with the forms of the Church of England in St. Mary Abbott's, Kensington. It took place in 1889, and the petitioner took no step to have it declared a nullity till she had gone through a second marriage with Mr. Ford, and till about, apparently, five or six years after the celebration of the first marriage with Stier. The case certainly is a very remarkable one; what is almost equally remarkable is the view which the judge took of it. He found that the petitioner's statements were true, that she did not consent to marry the respondent, but went through the ceremony as one of betrothal, and, in doing so, was to such an extent under the influence of her mother and the respondent, that she was not a free agent. He therefore pronounced a decree of nullity. Let the reader note that the mother was dead, and the respondent did not appear.

No one can undertake to say that the decision of Gorell Barnes J. was wrong. As between Mr. Stier and Mrs. Ford it was probably just enough, and common humanity inclines one to rejoice that a marriage which was never consummated, and must in any event

have turned out miserable, has been pronounced void. But we do assert, and with some confidence, that *Ford* v. *Stier*, following as it does upon *Scott* v. *Sebright*, 12 P. D. 21, sets a most dangerous precedent. It is hard to believe that a girl of seventeen really went through the marriage service without knowing its meaning; it is equally hard to believe that the influence of a mother, and of a man who, according to the lady's account, had never acted as a lover, could in reality amount to coercion or duress. The plain truth is that in *Ford* v. *Stier* an extension is given to the conception of coercion which makes it possible, in theory at least, for any girl to succeed in a suit for nullity if after her marriage she and her husband live apart. Cases such as *Ford* v. *Stier* suggest that the law of divorce is not sufficiently elastic, and that judges are tempted to pronounce void marriages which are not really void, but which it would be desirable, did the law allow it, to dissolve.

[Surely free agency or the contrary is a question of fact, and must be dealt with according to the evidence in each case. We do not understand our learned contributor to dissent from any rule of law laid down in *Ford* v. *Stier*. As to the facts, the judge saw and heard the witnesses, and we did not.—ED.]

'It is, I think, clear,' wrote Sir H. Elphinstone in this REVIEW (vol. v. 53, Notes on the English Law of Marriage), 'that a marriage on a British man-of-war . . . celebrated on the high seas in the presence of a priest is valid.' The very point has now occurred, and has been ruled by the President of the Divorce Division in accordance with Sir H. Elphinstone's opinion (*Culling* v. *Culling*, '96, P. 116), but it furnishes one more instance of that perilous uncertainty which hangs around what ought to be the clearest of all contracts—marriage. Seventeen years ago the Legislature passed an Act validating retrospectively marriages solemnized on board one of Her Majesty's ships on a foreign station in the presence of the commanding officer, but, English-like, it did not formulate the law for the future. Yet there must always be reasons for people being, in sailor language, 'spliced' at sea. There are, according to Macaulay, only two things to be done on a long voyage, to quarrel or to flirt, and of the two flirtation is much the most attractive.

In re Castioni, '91, 1 Q. B. 149, and *In re Arton*, '96, 1 Q. B. 108, 65 L. J. M. C. 23, throw great light, if read together, on the law as to the extradition of persons who may, to use a somewhat vague term, be described as political offenders.

In re Castioni shows that an offender, if accused of what is prima facie clearly an extradition crime, e.g. murder, cannot be legally

surrendered if the offence is of a political character, i. e. if it is incidental to, and forms part of, a political disturbance.

In re Arton shows that when the government of a friendly state demands the extradition of an offender for an offence clearly within the Extradition Act, 1870, and the extradition treaty with that state, the English Court has no jurisdiction to inquire whether the demand for surrender is made in good faith and in the interests of justice, and that the provision of the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 3, sub-s. 1, under which a fugitive criminal shall not be surrendered if he prove to the satisfaction of the Court that the requisition for his surrender has in fact been made with a view to try and punish him for an offence of a political character, applies only to an offence which has been already committed.

The combined effect of the two cases is to prove that our judges will interpret the Extradition Act, 1870, and the treaties made under it, in the spirit in which they interpret any ordinary Act of Parliament, and will not cut down the effect of the Act in order to guard against possible or conceivable hardship to political refugees.

In re Galwey, '96, 1 Q. B. 230, 65 L. J. M. C. 38, establishes that a British subject is a person 'liable to be surrendered' within the meaning of the Extradition Act, 1870, s. 6, and that under a treaty like the existing treaty between England and Belgium, the Crown has the option of either surrendering or refusing to surrender a British subject accused of an extradition offence in a foreign country. A way, in short, has been discovered of getting round the difficulty of surrendering a British subject commented upon by the Court in *Reg.* v. *Wilson*, 3 Q. B. D. 42. Here again we can trace the growth of the feeling in favour of extradition.

The mode in which our Courts now deal with the law as to extradition is sensible and commendable. It suggests, however, two general reflections which deserve attention.

First—The feeling of the judges, and still more the sentiment of the nation, with regard to the extradition of political refugees has undergone a great though unconscious change during the last thirty or forty years. Many of us can remember the time when Englishmen still in general believed, and not without good reason, that a political refugee was, even though he might have done acts which ordinary morality could not in strictness approve, a patriot whom it would be infamous to surrender at the demand of a tyrant, such, for example, as Louis Napoleon or King Bomba. We all of us now feel, and also not without reason, that when a foreign ruler, such, for instance, as the French President, or

the Government of Switzerland, demands the surrender of a fugitive criminal, it is more likely than not that the criminal, even though he may have taken part in political conspiracies, is a scoundrel whom good men of every country would wish to see duly punished. It is absolutely impossible to put French dynamiters on the same level as Mazzini or even Orsini. This change of sentiment influences the interpretation placed by the Courts on Extradition Acts. The terms of the Act of 1870 do not in practice mean exactly the same thing which they meant twenty-five years ago. Still less do they mean exactly the same thing which the same terms would have meant in an Extradition Act passed say in 1845. The truth is that the construction placed on any document generally depends on certain presumptions or assumptions made by the party construing it. In construing an Extradition Act or Treaty the Courts in 1896 rightly make every presumption in favour of the Government demanding the extradition of a fugitive criminal; fifty, or forty, years ago the Courts, when the offender was a political refugee, made, and rightly made, every presumption in favour of the fugitive criminal.

Secondly—We ought not to be in too great a hurry to extend extradition treaties. Such conventions are suitable only when made with states which are in the strictest sense civilized.

Certificates of shares in an American company on which a form of transfer and power of attorney has been executed in blank, may be liable to probate duty if they are marketable in this country and are operative by delivery.

This is the point decided by *Stern* v. *The Queen*, '96, 1 Q. B. 211. As it is admitted on all hands that probate duty could not fall on any property of a deceased person which, at the time of his death, is situate in a foreign country, and as it is further admitted that debts due from debtors abroad and shares in foreign companies are in general to be regarded as situate in a foreign country, the judgment of the Queen's Bench Division in *Stern* v. *The Queen* comes in effect to this; that share certificates of an American company transferable and marketable in England are to be regarded as themselves the property, viz. the shares, which they represent, and, as being such property, are liable to probate duty, and are not merely evidence of a title to property situate in America. In arriving at this conclusion the Court intended to follow *Attorney-General* v. *Bouwens*, 4 M. & W. 171, but has somewhat extended the operation of that case. In *Attorney-General* v. *Bouwens* the whole title to payment by a foreign government passed on the transfer of the bonds issued by such government. The certificates

to shares in an American company were marketable securities operative, but not completely operative, to pass the title to American shares. They were, in short, evidence of title to property situate in America, which is admittedly not liable to probate duty. We do not assert that the view taken by the Queen's Bench Division was wrong, but we do assert that its soundness is open to doubt. The judgment in *Stern* v. *The Queen* has, we believe, been appealed against, and we look with interest to the result of the appeal.

The question raised in *Stern* v. *The Queen* was stated by the Attorney-General to be, since the Finance Act, 1894, came into operation, a purely academic one. This statement, though substantially true, is not absolutely correct. Probate duty has indeed been superseded by estate duty, but oddly enough many of the technicalities which have rendered the incidence of probate duty a matter of perplexity will occasionally reappear in discussions about the incidence of estate duty. The latter duty falls on all property passing on the death of the deceased which is situate in the United Kingdom, but it will fall on such property when not situate in the United Kingdom only if the property is liable to legacy duty or succession duty. When therefore the deceased has died domiciled out of the United Kingdom, the liability of his property to estate duty may depend upon the answer to the inquiry, whether the property was or was not at his death situate in the United Kingdom? But whenever this inquiry arises, the Courts will be compelled to fall back on the rules with reference to the situation of personal property established by cases on probate duty (see Finance Act, 1894, ss. 2, 8). *Attorney-General* v. *Dimond*, 1 C. & J. 356; *Attorney-General* v. *Bouwens*, 4 M. & W. 171; *Stern* v. *The Queen*, are not entirely dead; they will continue to exist in a state of suspended animation, and will at long intervals, it is true, come to life again, and once more haunt the Courts.

The one certain conclusion which readers will draw from *Hoddinot* v. *Home and Colonial Stores*, '96, 1 Q. B. 169, is that the enactments on which depends liability to pay house duty most grievously need consolidation and simplification. If there is a matter which ought to be made absolutely clear it is what are the circumstances under which the occupier of a house is bound to pay duty for the whole of it. Yet the one point certainly established by *Hoddinot* v. *Home and Colonial Stores* is that two very intelligent judges found the House Duty Acts extremely hard to understand, and that, though they agreed in the conclusion that

the whole of a particular house was chargeable to duty, they arrived at the conclusion on somewhat different grounds, and felt that the enactments they had before them were hardly comprehensible. The enactments regulating the imposition of house duty ought certainly to be redrafted, and probably ought to be amended by striking out exemptions which are of no real benefit to the public, and render complex what ought to be perfectly clear rules as to the incidence of the tax on inhabited houses.

We have great doubts of the law laid down in *Edwards* v. *Jenkins*, '96, 1 Ch. 308, 65 L. J. Ch. 222. 'A custom for the inhabitants of several adjoining or contiguous parishes to exercise the right of recreation over land situate in one of such parishes is bad.' Why so? Several parishes may be (or may have been) included in a manor or lordship, and we can see no reason in law why the lord of divers contiguous vills should not, before the time of legal memory, have granted to the inhabitants of all those vills the right to play games on a close within one of them. We concede that such a custom cannot be laid in respect of a 'district' not defined by any boundaries known to public law. So far the case is obviously right. But we submit that, subject to the evidence being sufficient and not too indefinite, (Dale + Sale) is as certain, and as good in law for this purpose, as Dale alone. The reason of *Gateward's* case is confined to profits *à prendre* and has nothing to do with this.

The people who commit suicide in England from prudential motives—to provide for their families or to 'do the insurance company' like the keen Yorkshireman—are not numerous, but in the land of the almighty dollar suicides deliberately planned are apparently so frequent as to make the title of the suicide-assured a matter of some moment. The offices are clearly at his mercy, and a learned American judge recognizing this fact has lately held that there is in every policy of life insurance an implied warranty not to commit suicide while sane (*Ritter* v. *Mutual Life Insurance Co.*, 30 American Law Review (Jan.) 154). This fiction of law the learned judge rests on the ground that the insurance company bases its calculations on lives running out to their natural termination, that the assured knows this and contracts on that basis; but apart from the objectionableness of implying warranties, surely the natural comment on this is that suicide can be reckoned with like the gallows or drunkenness or any other factor of life assurance risk. In England an implied warranty is not wanted, because the policy of our law disentitles a man to reap the benefit of his own criminal act—which felo-de-se is.

In America this is not so. The better opinion seems to be that title may be acquired through a crime (*Carpenter's Estate*, 32 Atl. Rep. 637: 30 American Law Review (Jan.) 130), even though that crime is parricide. Compared with this our English highwayman claiming an account against his fellow is quite a modest demand. The problem as it presents itself to American lawyers is how a crime can defeat the operation of statutes like the Descent Act or the Wills Act, and no doubt there is a difficulty where an heir murders his ancestor, or a legatee his testator, in reading into the Descent Act or the will a clause of disinheritance or revocation. English law does not attempt to do so, but creates, on grounds of public policy, a personal disability in the criminal to profit by his crime. This principle of public policy does not seem to be generally accepted in America, however it may be in the civil law or English law. The American view is that the law has assigned to each crime its proper punishment, and the Courts have no right to add a fresh penalty in the form of forfeiture.

One aim of the fourth section of the Statute of Frauds is to secure that all agreements with regard to an interest in land should be proved by a note thereof in writing. *X* and *A* agree orally that *X* is to have exclusive possession of certain land for three successive Bank Holidays and to pay £45 for the use of the ground, paying an instalment of £15 for each of the three days. *X* enters and occupies the land for the first of the three days and pays the first instalment of £15. He then refuses either to occupy the ground for the other two days or to pay the balance of the £45. When sued for the amount he pleads that the claim is barred under the Statute of Frauds, s. 4. The Queen's Bench Division has held (*Smallwood* v. *Sheppards*, '95, 2 Q. B. 627) that *A* is entitled to the whole of the £45. There can be no doubt that this decision is a just one, and we are quite willing to assume that it is in conformity with precedents. Is it, however, possible to deny that it cuts down the effect of the statute? But if so, is it not doubtful whether a law to which the Courts will never willingly give effect ought to remain in the Statute Book?

Lord Coke called the Statute of Treasons a 'blessed statute.' We are more inclined nowadays to call blessed such statutes as the Factory Acts and the Shop Hours Act, 1892. 'The Cry of the Children,' so pathetically chanted by Mrs. Browning, has entered into the ears of the Legislature, and we are not disposed to quarrel with the charters of child labour because they may seem a little overcareful. 'What harm can there be,' it was said in *Pearson* v.

Belgian Mills ('96, 1 Q. B. (C. A.) 244), 'in a child cleaning fixed machinery? What danger is there of its being caught by running belts or whirling wheels?' The short answer which the wisdom of Lindley L.J. gives to such special pleading is that the Legislature 'meant children to be kept clear of all moving machinery whatever,' and any one who has practical acquaintance with children, their heedlessness and want of caution, will understand the necessity for interpreting the letter of the law strictly. The same benevolent interpretation has been put on the Shop Hours Act in *Collman* v. *Roberts* (12 Times L. R. 202). 'Is an errand boy,' to put it shortly, '"in or about" the premises when he is running errands?' Corporeally he is not; but he is 'in or about' the business carried on there, and that is enough.

Περὶ παντὸς τὴν ἐλευθερίαν is not only the motto of the Selden Society, as it was of Selden, but of the law of England. Hence its jealousy of by-laws amongst other things—a salutary jealousy, because county councils and local authorities and railway companies, and other autocratic bodies are constantly encroaching on the area of individual liberty, and turning or tending to turn loyal and liberty-loving citizens into 'dumb driven cattle.' *Strickland* v. *Hayes*, '96, 1 Q. B. 290 is an illustration. Singing profane songs is a proper subject for a by-law, but when a municipal by-law besides prohibiting the singing of profane songs and ballads in the streets goes on to prohibit it 'on land adjacent thereto' it is transcending its proper sphere and the law will give it no assistance. Not that the law approves profane singing: on the contrary, it strongly disapproves it, but it leaves the profane man's punishment to society, to his conscience, to his Church. What the law is concerned with is—not the censorship of private morals—but the annoyance of the public. As to the individual himself, well! perhaps like the late Archbishop Magee the law would rather see England free than sober.

In days like these, when every post solicits us to some new scheme of speculation, the drafting of an investment clause is a responsible task. Given the ideal trustee or trustees, the prudent man of business whom Courts of Equity delight to parade, the settlor or testator cannot do better than give such a paragon an uncontrolled discretion—a free hand; but ideal trustees are not always forthcoming: even if the original trustees—the settlor's own selection—are such, succeeding trustees will not always be. There is the fraudulent trustee, the weakly good-natured trustee, the

sleeping trustee, the unbusiness-like trustee—all so many possibilities of trouble. To give these plenary powers of investing 'as they shall think fit' would be to court disaster. They must be tied up—tethered with a reasonable length of rope. Cestuisque trust who are at the mercy of go-as-you-please trustees will be glad to hear, however, that the words 'as they shall think fit' mean in the eye of the law 'as they shall *honestly* think fit.' They will not enable a trustee to take a bribe for putting the trust fund into some speculative enterprise and then say—'It was authorized: here is the bribe if you like.' (*In re Smith, Smith* v. *Thompson*, '96, 1 Ch. 71, 65 L. J. Ch. 159.)

The doctrine of ultra vires may be a very necessary one to prevent directors squandering the shareholders' money on chimerical objects: but as an ultra vires borrower the company figures as a consummate hypocrite, not to say rogue. 'True' it says, 'I had your money, but my directors had no power to borrow, and you must be taken to have known they had none. I wash my hands of the whole transaction. You may sue the directors if you like, or if you can on an implied warranty: Good morning.' Thereupon equity descends as a *dea ex machina*, with a fiction of its own in the shape of the doctrine of surrogation; where, that is, the lender's money has been used to pay off the company's debts. It supposes this fiction—the quasi lender and the company's creditor to meet together, and that the quasi lender advances to the creditor the amount of his claim against the company and takes an assignment for his own benefit—would it not be simpler, by the way, if a fiction is to be resorted to, to say that the lender pays off the company's creditor at the request of the company?—anyhow the fictitious transaction is not a borrowing by the company. It does not add to the company's liabilities, but merely substitutes one creditor for another. In a case of *In re Lough Neagh Ship Co.* (1896, 1 I. R. 533), the Master of the Rolls in Ireland has just been giving effect to this surrogation doctrine. The debt paid off with the ultra vires borrowed money was a shipbuilder's debt for which he had a lien. The Court surrogated the lender to the shipbuilder's debt, but why not to his lien? Logically it surely ought.

When the phrase 'contempt of Court' is used, it conjures up to the mind of the layman the picture of some party or witness discharging abusive language at the judge, possibly a missile—a boot or an egg—at the sacred seat of Justice. As a matter of fact, contempt seldom touches the personal dignity of the judge. Its heinousness

consists in its being an interference with the course of the administration of justice—a much sublimer conception. Nothing can possibly be worse in this way than intimidating witnesses, because if witnesses—the best evidence—are not forthcoming, justice must be indeed blindfold. The punishment therefore lately meted out by the President of the Divorce Division to an offender in this way was not at all too heavy. Committal—a month's imprisonment—is an invaluable object-lesson in the principles of law. It is the only way to bring home to the *profanum vulgus* the gravity of an offence like tampering with witnesses.

We have received a specimen number of La Administración, a review of public law, economics, and politics published at Madrid. It appears to be well informed and quite up to the level of similar publications in other continental countries. English readers may be interested in a Spanish publicist's view of the Venezuela controversy. President Cleveland's Message is said to have been framed in most aggressive terms; the attitude of the English Government is described as cool, temperate, and correct. A tender of good offices on the part of Spain is suggested, but the writer seems to overlook the fact that Spain, as the predecessor in title from whom the Venezuelan claim is deduced, could not conveniently act as an impartial mediator. We hope, however, that the question may be well advanced towards a settlement by the time this note is published.

An interesting paper on the history of common-field tillage in Hungary, by Charles Tagány, of the Royal Archives at Budapest, has by accident not been noticed earlier. It is an extract, as we have it, from a review published in German. We learn that common fields with a compulsory scheme of cultivation (*Flurzwang*) are still to be found in Hungary, and that in the time of Maria Theresa there were still shifting allotments of the arable land. At Debreczen, for example, there was a fresh allotment every seven years. There are traces of an earlier state of things in which land was so plentiful that every member of the community might help himself. Clearly these evidences should be made better known in Western Europe.

In our last number we printed concerning Mathew and Macnaghten's Reports of Commercial Cases that they 'do not confine themselves to what is *reputable* from the strictly professional point of view.' Whether those words were actionable, *quaere*: for do

not law reports necessarily deal with some things which are not reputable from any point of view? But the word we wrote was *reportable*.

We have received the first number of the Deutsche Juristen-Zeitung (Berlin: Otto Liebmann). It is intended to be a practical organ of the legal profession in Germany, and the approach of a final decision on the question of adopting the Civil Code appears to have in some measure determined the date of its appearance. An introduction by Prof. Laband (who is also joint editor) gives ample warranty of competence, and, so far as an English lawyer can judge, the contents are both learned and business-like.

We have received an anonymous MS. entitled 'Justice on the March.' The writer is requested to send his name and address to the Editor, it being our rule not to publish or consider anonymous communications. He is also referred to our standing notice on this page.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE RIGHTS OF A SUZERAIN.

IN President Kruger's dispatch to the British Agent at Pretoria of Feb. 12, 1896, the following passage occurs:

'. . . the government is compelled not only to remark that it can suffer no interference or intermingling, however well-intentioned, in regard to internal affairs of which mention is made in the above-mentioned telegram dispatch of the Secretary of State, but' &c. . . .

The dispatch of the Secretary of State referred to is, of course, Mr. Chamberlain's celebrated dispatch of Feb. 4, recommending certain internal reforms in the South African Republic, by which a measure of autonomy would be granted to the Uitlanders of Johannesburg.

Now this contention of the Transvaal Government, which has been put forward more than once and in more or less emphatic terms during the course of the recent controversy, that Her Majesty's Government can claim no right to interfere in the internal affairs of the Transvaal, does not appear to be by any means so indisputable as the Boer Government maintains.

Let us assume that the rights of suzerainty claimed by the British Government over the Transvaal, by virtue of the combined effect of the Convention of Pretoria of 1881 and the Convention of London of 1884, are admitted. There can, in truth, be little doubt upon the point, although it doubtless suits the policy of certain foreign nations to affect to believe that the whole question is in issue. The effect of the suzerainty of one nation over another is to divest the latter of a portion of its sovereign rights. In other words, this latter becomes a semi-sovereign state.

Semi-sovereign states are usually divided into two classes, (1) those which are the subject of a declared Protectorate, (2) those which, although not the subject of a declared Protectorate, are yet in a certain condition of subordination with regard to some other state. The latter are designated by international lawyers as vassal states, and the state to which they are subordinate is known as the Suzerain Power. The principal criterion of this relationship is the question of international representation (see Pillet, *Revue de droit international public*, 1895, No. 6, p. 598). If a state is subject, in the conduct of its international relations, to the supervision and veto of a foreign power, it is undoubtedly a vassal

state and subject to the suzerainty of that power. And that this is the condition of the South African Republic with regard to Great Britain can, in the face of Article IV of the Convention of London, hardly be denied, and this circumstance alone is sufficient to establish the fact of British suzerainty, whether the word itself was or was not retained in the text of the latter Convention.

With regard to the first category of semi-sovereign states, there is no doubt that the protecting state has wide powers of interference in the internal affairs of the protected state. The exact measure of these rights of interference has been the subject of considerable controversy among international lawyers, and there is little in the way of a general theory to be gleaned from the recognized text-books on the subject, although Ortolan (*Règles internationales et diplomatie de la mer*, t. I. p. 48), Chrétien (*Principes de droit international public*, p. 255), and Holtzendorff (*Handbuch des Völkerrechts*, t. II. p. 102) seem to have come nearest to a satisfactory formula. Shorn of academic verbiage, it amounts to this, that the intervention of the protecting state is justifiable whenever such intervention is necessary in order to safeguard its responsibility towards foreign nations. For it is clear that where one state represents another in its external relations, the former is responsible to foreign governments for the wrongful acts or omissions of the latter, and consequently must be armed with the right to intervene in the internal administration of the protected state for the purpose of guarding against claims for indemnity on the part of foreign governments. This is generally admitted, and starting from this point, it has been possible to draw up a tolerably complete list of the heads under which the powers of intervention of the protecting state naturally fall, as has been done by several writers on international law (see particularly Pillet, loc. cit.).

It would seem that the same principles are applicable, in a modified degree, to the relations between vassal and suzerain. As already observed, the protecting state is liable to foreign nations mainly because it represents the protected state in its foreign relations. Is not this the case as between the South African Republic and Great Britain? No doubt the representation of the Transvaal by Great Britain is by no means so complete as in the case of an ordinary protectorate, say, for instance, that of France over Tunis. I am, of course, aware that the Boer Government has a peripatetic and permanently accredited agent who travels from one European capital to another to negotiate with foreign governments on behalf of the South African Republic. But in reality the right of veto reserved to the British Government with regard to any treaty

proposed to be concluded by the South African Republic (with the single exception of the Orange Free State), practically reduces the powers of the Transvaal, in the conduct of its foreign affairs, to insignificance, since it is useless for it to enter into negotiations with foreign states, with a view to ultimate conventions, without having previously obtained the assent of Her Majesty's Government, and consequently the whole conduct of these relations must in fact devolve and depend upon the British Foreign Office. As a corollary, it can scarcely be denied that where the British Government has authorized, either expressly or impliedly, the conclusion of a treaty with a foreign state, it has assumed a certain measure of responsibility, both legal and moral, towards that state for the due observance of the treaty in question, and in the event of its violation there can be little doubt that remonstrance and possibly claims for indemnity would be addressed to the British Government. [I do not desire to be understood as maintaining that the British Government is to be regarded as the guarantor of loans obtained by the Transvaal from foreign states, for these are not 'treaties' in the usual sense of the word, but ordinary contracts.]

It is further submitted that even in the absence of express treaty, Great Britain as the suzerain power, having, in the last resort, the control of the foreign relations of the South African Republic, is jointly responsible with the Boer Government to foreign powers for the internal order of the Republic; and if by reason of misgovernment a state of anarchy or civil war should ensue, by which the lives and property of foreign residents were endangered, it would be the duty of the suzerain power to intervene in order to escape ulterior liability towards foreign powers: for though such liability is not usually recognized as a matter of international law, yet governments have often found it expedient to acknowledge it as a matter of international comity, and thus the result is practically the same. To apply these principles to the condition of things in the Transvaal, it appears to follow logically that Her Majesty's Government has the right, nay the duty, to interfere in the internal affairs of the South African Republic, if the Government of that Republic, by its unjust and tyrannical conduct towards the Uitlanders, jeopardizes the maintenance of order and the security of human life and property.

MALCOLM M^c^ILWRAITH.

THE WATER-CARRIER AND HIS RESPONSIBILITY.

[A Problem of the Past with a Significance for the Present.]

THERE is no department of our commercial law which possesses so varied and interesting a history as our law of carriers. The countries which gave birth to its rules are not more widely separated in space than the periods in which those rules were formed are distinct in time. Especially is this the case with the law of carriage by water. Some of its principles we copied from the Dutch at the commencement of the eighteenth century; some were connected with the great revolution in maritime commerce inaugurated by the Lombards in the thirteenth and fourteenth centuries, and finally established by the merchants of the Hanseatic League in the succeeding century. Other rules originated at a still earlier period in the application of the principles of a quasi-partnership as a substitute for insurance; for at a time when sea adventures were as perilous as they might be lucrative, losses and gains were not unnaturally shared in common by all members of the 'communitas.'

Much of our law of affreightment admittedly rests upon a Roman foundation. Our conception of general average can be traced further back to the Lex Rhodia, but curiously enough our principle of valuing cargo at its destination price for purposes of contribution comes from a Scandinavian practice of the thirteenth century.

The history of isolated legal rules would form indeed but a fragmentary and unsatisfactory investigation. It is therefore desirable to find some central conception around which some of the interesting portions in the history of our carriers' law may be conveniently clustered. The liability of the carrier offers itself as such a conception. The causes which have produced changes in the law of carriage have generally at the same time modified the carrier's liability. And throughout all these changes one may perceive the perpetual recurrence of a problem—the riddle of the sea-carrier's liability—which has presented itself to the jurists of different ages and of different countries, and which now stands awaiting a more satisfactory solution at the threshold of our own law.

The history of the responsibility of the carrier by water naturally

divides itself into three parts. (1) The water-carrier and his responsibility; a problem in Roman law. (2) The water-carrier and his responsibility; a problem in the Middle Ages. (3) The water-carrier and his responsibility; a problem of modern times. Inasmuch, however, as this responsibility is to be considered with especial reference to English law, it will perhaps be objected that the Roman law is not entitled to separate consideration, and that this history should begin with the earliest English records.

To this it may be replied that the earliest records speak of Courts which administered a 'law maryne,' and that the liability of the carrier in this 'law maryne' is best explained after a consideration of Roman law.

Further, a Roman origin has been ascribed to the rule that a common carrier is an insurer of the goods he carries, saving acts of God and the Queen's enemies. According to this theory the rule is an adoption of a special liability imposed on sea-carriers by a praetorian edict; but, according to another view, it is 'characteristically English' and a survival of Teutonic law. The latter theory has been supported by the careful researches of Mr. Justice Holmes, while the advocates of the former have relied too often on vague conjectures. Not only have few facts been adduced to show the mode in which the conception might have been borrowed, but even the nature of the carrier's liability in Rome seems not infrequently to have been misunderstood. Yet to do justice to the theory of a Roman origin without some examination of Roman law would not be possible.

In Austria and in Germany some recent writers appear to regard the theory of a Roman origin as the sole view possible, and refer to the 'act of God and the Queen's enemies' as illustrating the mediaeval objective interpretation of the Latin term 'vis maior.' It will be my object to examine the origin and history of that exemption in English law, and in so doing to see how far such allusions are correct.

A final argument for the separate consideration of Roman law lies in the fact that the recent application of scientific invention to the development of transport trade marks the commencement of a new era. In this new era the law of carriers will be nothing if not international, and we must remember that the principles of Roman law are still enforced in many parts of Europe. Now the carrier's liability is a question which has attracted more attention than any other in Roman law within recent years, and its investigation is of very general interest, as showing how far the principle of the Roman jurists that civil liability should be based on 'culpa' was subject to exception.

Therefore, in this our period of transition, we shall lose nothing by again referring to the writings of the old jurisconsults; and even where these furnish no assistance to us in present perplexities, they will enable us to perceive how far altered conditions of transport have produced a development of law.

The present article is accordingly confined to the history of the problem as treated in the Roman system.

In the sixth century after the founding of Rome, the sea-carrier was made an insurer of the goods he carried.

'Ait Praetor: nautae caupones stabularii quod cuiusque salvum fore receperint nisi restituent, in eos iudicium dabo,' D. 4. 9. 1. pr., Edict. Perp. xi. (2)[1].

We have here the 'iudicium in factum'; the iudex has only to ascertain (α) whether the carrier received the goods, (β) whether he delivered them again.

If the first point is established, but not the second, the sea-carrier is liable apart from any question of negligence.

The formula given in the action would run[2]—

'Si paret N^m N^m, cum navem exerceret, A^i A^i res, q d. a., salvas fore recipisse neque restituisse, q. e. r. e., t. p., iudex N^m N^m A^o A^o c., s. n. p. a.'

This liability, as Pomponius afterwards observed[3], was independent of special undertaking; it arose simply from the fact that the carrier had received the merchandise for conveyance. Paulus observes that the fact of the carriage being gratuitous makes no difference.

As regards, in the first place, the origin of this remarkable liability, the phrase 'salvum fore recipere,' which occurs in the text of the edict, would appear to indicate that it arose from an autonomous taking over of risk on the part of sea-carriers and innkeepers, whether by means of a unilateral formal declaration with the word 'recipio[4],' or by a 'pactum,' at first expressed but afterwards understood[5].

The praetor makes obligatory that which had originally been optional. There is, however, no direct allusion to such an origin in the writings of the Roman jurists.

[1] Lenel, Das Edictum Perpetuum, p. 103; Bruns, Fontes Iuris, p. 193.
[2] Lenel, p. 104; Rudorff, E. P., s. 47. [3] D. 4. 9. 1. s. 8 and 3 pr.
[4] Goldschmidt, Das Receptum Nautarum, Zeitschrift für Handelsrecht, iii. p. 99 et seq. So Bruckner, Die custodia nebst ihrer Beziehung zur vis maior, 1889, p. 168. [5] Pernice, Labeo ii. p. 347.

Baron [1], on the other hand, maintains that the liability originated solely in the action of the praetor, and has very recently explained 'salvum fore recipere' by reference to the early division of travellers' goods into the portion to be carried untouched (salvum) and the portion for consumption on the way. The latter was frequently of considerable bulk and importance, because nothing besides bare necessaries [2] could be obtained in the inns at stopping-places, but it was only with regard to the former that the liability was imposed. Comestibles, &c., were taken care of by the passenger himself [3], and it would seem unreasonable to increase the responsibility of sea-carriers and innkeepers with respect to them.

This proposition is, however, in direct contradiction to Vivian, as rendered by Paulus in D. 4. 9. 4. s. 2, and involves the supposition of a gloss in the last-mentioned text.

Moreover, the explanation gives but one meaning to 'recipere,' viz. to take over the goods; yet in the edict it probably possesses its earlier signification, viz. to take over responsibility with respect to them [4].

As regards, in the next place, the reasons which induced the praetor to impose the liability, there have been numerous suggestions.

Centuries later, when the nature of the liability had been somewhat modified, Ulpian furnished an explanation of the edict which may have been current in the early commentaries [5], or may have been peculiarly his own [6]. He describes the 'maxima utilitas huius edicti' in preserving good faith, in insuring the safety of the goods delivered, in preventing fraud and robbery, and the concerting with robbers; for he adds 'nisi hoc esset statutum, materia daretur cum furibus adversus eos quos recipiunt coeundi,' D. 4. 9. 1. s. 1. No doubt sea-carriers and innkeepers were not respectable persons, and certainly the country was always infested with robbers [7], but a far more satisfactory explanation of the edict is to be found in a desire to remove difficulties in matters of proof.

By the edict 'de his qui effuderint,' which dates from the same period, the praetor imposed on the master of a house a duty of insuring safety. The master was held liable when, although without

[1] Baron, Die Haftung bis zur höheren Gewalt, 1892; Archiv f. d. civilistische Praxis, lxxviii. pp. 240–244. [2] And see Marquardt, Privatleben, p. 455.

[3] Cf. D. 14. 2. 2. s. 2, and Baron's citations from lives of the saints supplied by Usener.

[4] Goldschmidt, Zeitschr. f. HR. iii. 97 et seq.; and see Bekker, 'Recipere' und 'permutare' bei Cicero, 1882, Zeitschr. d. Sav. Stift. iii. p. 7.

[5] So Dernburg in Grünhut's Zeitschr. f. d. privat und öffentliche Recht, xi. p. 340; Baron, Archiv f. civ. Pr. lxxviii. 205.

[6] See Pernice, Labeo, ii. 348, note 9 and D. 4. 9. 3. s. 1.

[7] See Friedlaender, Darstellungen aus der Sittengeschichte Roms, 1889, ii. pp. 46–52.

fault on his part, something had been thrown out of a window of his house so as to injure a person in the street below[1]. Before this edict the person injured might in many cases have failed to obtain redress through not having perceived the person who had thrown the article.

The edict 'naut. caup. stab.' was another application of the same principle[2]. The shipper might not know how his goods had been abstracted or damaged, nor whether there was any one whom he could hold responsible. If there had been 'culpa' on the part of the carrier it could be easily concealed. It was, therefore, better that the carrier should be held liable for all loss or damage (since he could best take precautions against such loss) than that the freighter should be deprived of his remedy.

For these reasons the insurance liability commended itself to the public, it was continued unaltered for a considerable period, and by the reign of Tiberius it was understood to apply to bargemen who had not been expressly referred to in the terms of the edict[3]. But about this time the harshness of the rule was mitigated[4] in an important manner. The praetor, acting on the advice of Labeo, granted an 'exceptio' to the carrier by water when the goods conveyed had perished through shipwreck or had been taken by pirates. In later times the 'exceptio' is referred to in more general terms as being given in any case of loss through 'damnum fatale,' 'hoc edicto omnimodo qui recepit tenetur nisi si quid damno fatali contingit.' Exner has pointed out that the idea of such an 'exceptio' as Labeo suggested was not novel[5]; its introduction appears to have produced no change in the structure of the edictal formula; the precise effect to be attributed to it in modifying the sea-carrier's liability has been much discussed. Certainly he was responsible for all loss, theft, or damage, occasioned by his assistants in the undertaking, or by the passengers whom he had received into his ship. He was also responsible for all other loss or damage which he could not show to be the consequence of 'vis maior[6].'

What, then, is the meaning to be attributed to 'vis maior' in this connexion? This has naturally been considered a vital question in Austria, Germany, and Switzerland, for upon the interpretation given depends the liability attached to railway and steamboat companies, and other carriers by land or sea[7].

[1] See D. 9. 3. 1.
[2] See generally Exner in Grünhut's Zeitschr. x. pp. 534–542.
[3] See D. 4. 9. 1. s. 4.
[4] Otherwise Baron, Archiv f. civ. Pr. lxxviii. pp. 244, 245, the 'exceptio' was always understood.
[5] Grünhut's Zeitschr. x. p. 530 note 36, citing Livy xxiii. 49, B.C. 215, and xxv. 3. 10, B.C. 212; Polyb. vi. 17. 5; Cicero, De Prov. Consul. 5. 12.
[6] See Goldschmidt, Zeitschr. iii. pp. 93, 94.
[7] H. G. B. arts. 395 and 607; Swiss Ob. Rt. art. 457.

In Italy [1], and in France [2], and in all countries which have adopted the principle of the praetor's edict, the subject is evidently not without importance. A consideration of the Roman conception, and its comparison with that exemption of the carrier in English law which is indicated by the phrase 'act of God,' may therefore possess some interest.

Since the days of the glossators two views have alternately dominated as regards the interpretation of 'vis maior'; the one the theory of a subjective criterion, the other that of a criterion objective.

Without discussing the propriety of this terminology, which would lead to the controversy whether the law professes to take cognizance of the will, and not rather of its manifestation, we may here make use of it as that generally accepted.

According to the former view (A) 'vis maior' is simply a mode of expressing the fortuitous character of an event in a particular instance, considered with reference to a certain degree of prudence and foresight on the part of the person alleging it as a ground of exoneration.

According to the opposing doctrine (B) 'vis maior' denotes specified or determinable external events which are in no way dependent on the conduct of the carrier in the particular case, but remain the same for all persons and under all circumstances.

In other words, the sea-carrier was an insurer with certain exemptions which possessed a general external character. I may here note, in reply to an objection to the term 'insurer' as thus used [3], that in Anglo-American law the word as applied to the carrier has a signification somewhat different from the popular one, both in the purpose and nature of the liability indicated [4]. Throughout this article I use this term in the narrow sense, as merely indicating an absolute liability imposed by law.

It is evident that the form assumed by the theory of a subjective criterion depends upon the degree of foresight and care which is adopted as an index in determining the fortuitous nature of the event. The degree of care may be definitely fixed by the index, or the index may only vaguely denote the degree of care. This will be rendered clearer by several examples.

A. 1. The prevailing view with the glossators [5] was that 'vis maior' was simply the negation of 'culpa levissima,' 'intra levissimam culpam et casum fortuitum nihil est medium.' Here 'culpa

[1] See codice civ. art. 1631; codice de com. art. 82.
[2] See cod. civ. art. 1784; cod. de com. art. 103.
[3] See Baron, l. c., 292.
[4] See *Andrew Burnside* v. *Union Steamboat Co. of Georgia*, 10 Rich. p. 113 [South Carolina Court of Appeals].
[5] Cf. Gl. ad D. 4. 9. 3.

levissima' is a fixed standard which definitely marks the limit of liability and the commencement of 'casus fortuitus' (which was identified with 'vis maior'). It has, however, long been shown that such a standard is illogical in theory and impossible in practice; nor can a recent attempt to revive the doctrine be considered as successful [1].

On the other hand, some writers, while guarding themselves against the theory of a 'culpa levissima,' yet speak of a 'diligentia diligentissimi.' This may correspond either to an objective or to a subjective interpretation of 'vis maior.'

Baron [2], the chief supporter of this terminology, regards the 'diligentia exactissima' (exacta) of the 'paterfamilias diligentissimus' as a technical expression used in the sources to denote liability for 'custodia' (technical sense). The phraseology signifies that there was a possibility of preventing such loss or damage as would occasion liability, although there might indeed be liability in spite of the care of the '*diligens* paterfamilias.' So that 'omissio diligentiae exactissimae' need not be 'culpa,' rather are standards of 'diligentia' abandoned. The liability finds its limit in 'vis maior,' whose characteristic is objective irresistibility, and with which therefore even the 'diligentissimus' cannot cope.

It may briefly be noted that this doctrine has been fiercely attacked [3], not only because it requires the recognition of technical 'custodia' in cases where it is not generally supposed to exist, but also because 'diligentia,' even 'diligentissimi,' seems used in the sources in contradistinction to 'culpa': 'culpa autem abest, si omnia facta sunt, quae diligentissimus quisque observaturus fuisset.' Gaius, D. 19. 2. 25. s. 7.

Baron's interpretation of 'vis maior' will be discussed subsequently with other objective interpretations. A Swiss writer [4] has followed Baron in essentials, but with variations which produce results less satisfactory. With him 'vis maior' is not defined in order to determine thereby the limits of 'diligentia exactissima,' but the latter is regarded as given for the determination of the former. 'Vis maior' is accordingly subjectively interpreted to mean that which is unavoidable by the exercise of 'exactissima diligentia' in the particular case. The writer guards himself against 'culpa levissima' on the ground that neither law nor contract can compel

[1] Huber, Zum Begriffe der höheren Gewalt, 1885, but see Leyen in Goldschmidt's Zeitschr. xxxiii. p. 430.

[2] See his article Die Haftung für custodia in Archiv f. civ. Pr. lii. p. 44, and his recent work Die Haftung bis zur höheren Gewalt, 1892, Archiv f. civ. Pr. lxxviii. p. 203, especially 206, 225–237, 288, 294.

[3] See Stintzing, Ueber vis maior im Zusammenhang mit periculum und Haftung, 1893, Archiv f. civ. Pr. lxxxi. pp. 433–435, &c.

[4] Stucki, Ueber den Begriff der höheren Gewalt, 1890.

any person to apply this extreme care; one can only be held responsible for it—a distinction which has been criticized as unsubstantial[1].

Certainly no *abstract* standard of 'diligentia' higher than that of the 'bonus paterfamilias' can be set up.

A. 2. If, however, this standard itself be taken[2] as indicating the point at which liability ceases and 'vis maior' comes in, 'vis maior' becomes something which under the given circumstances oversteps the bounds of ordinary and reasonable prudence.

No doubt 'vis maior' is sometimes used in contradistinction to 'culpa.' Paulus places them in opposition in D. 13. 7. 30: 'culpam dumtaxat ei praestandam, non vim maiorem,' and again he opposes 'negligentia' to 'casus maior' in D. 2. 13. 7 pr.: 'rationes quas casu maiore, non vero negligentia perdiderit[3].' But where 'custodia' (technical sense) exists it is evident that 'culpa' and 'vis maior' are not coterminous, but separated by an intervening zone corresponding to liability 'sine culpa.'

The jurist who would go so far as to deny the existence of technical 'custodia[4]' has to explain why 'furtum' was never considered as 'damnum fatale[5],' although it might admittedly occur without any negligence on the part of the person from whom the thing was stolen[6]. He is driven to the conclusion that the liability 'sine culpa' of the sources only denotes a liability imposed in particular respects on particular grounds, but not a general liability. Thus Pomponius is only thinking of the sea-carrier's liability for loss or damage occasioned by passengers and crew when he declares: 'in locato conducto culpa, in deposito dolus dumtaxat praestatur, at hoc edicto *omnimodo* qui recepit *tenetur, etiamsi sine culpa eius res periit* vel damnum datum est, nisi quid damno fatali contingit,' D. 4. 9. 3. 8. 1. An interpretation which in view of the general words used appears somewhat strained[7].'

A. 3. Instead of adopting that view we might consider that 'vis maior' denotes in the case of the 'receptum' the limit of a 'diligentia' exceeding that of the 'diligens paterfamilias.' In which case we arrive at the doctrine which has been dominant since the middle of the century.

[1] Bruckner, in the Kritische Vierteljahresschrift für Gesetzgebung und RW. xxxvi. (1894), p. 400.

[2] Cf. Stintzing, Archiv f. civ. Pr. lxxxi. pp. 462, 463, and Bruckner, Krit. VJSchr. xxxvi. p. 404; but see infra.

[3] And on Ulpian in D. 13. 7. 13. 8. 1, and Gaius in D. 18. 6. 2. 8. 1, see Dernburg, Grünhut's Zeitschr. xi. 338 et seq.: otherwise Baron, Archiv f. civ. Pr. lii. 78, note 41, lxxviii. pp. 236, 237, 273, but on the first text cf. Stintzing, l. c., 434, note 18.

[4] So Gerth, Der Begriff der vis maior im Römischen u. Reichsrecht, 1890.

[5] See Ulpian in D. 17. 2. 52. 8. 3.

[6] The old theory of Löhr being abandoned.

[7] See Bruckner's criticism of Gerth, Krit. VJSchrift, xxxvi. 388–399.

No discussion of this view is possible without some reference to that jurist to whose deep researches the prevailing views owe, in no small measure, their very existence. Before the 'Receptum Nautarum' of Goldschmidt, which appeared in his Zeitschrift für Handelsrecht in 1860, the conception of 'vis maior' had received no detailed examination. In this treatise Goldschmidt investigated fully the precise nature of the carrier's liability in Roman law, and the manner in which that liability had been continued in the commercial law of modern times. The conclusions of Goldschmidt have been regarded as constituting the highest juristic authority to which courts could appeal or commentators refer, and until within the last few years have met with nearly universal acceptance.

According to this authority[1] the criterion of 'vis maior' is in no way objective. Whether an event does or does not constitute 'vis maior' is matter for the determination of the judge, who will examine whether, considering the measures which could be expected in the particular case, the loss or damage was absolutely inevitable. 'Ex locato' the carrier is only bound to exercise the care and prudence of a 'bonus paterfamilias,' 'ex recepto' he is required to take all kinds of precautions rendered necessary by circumstances; he is responsible for loss or damage which has been occasioned by the omission of such precautions. This liability is neither the ordinary liability for negligence nor absolute insurance, and apart from the particular case it is impossible to fix exactly the point at which it ceases, and 'vis maior' comes in. This view is therefore clearly distinguished from that which fixes an absolute standard of 'diligentia.' No standard is fixed, each case rests on its own merits. There is no liability for 'culpa levissima,' but negligence will be presumed by law unless the carrier establish the exercise of a care which is greater than that of the 'bonus paterfamilias.'

Windscheid expressed his agreement with Goldschmidt in essential points. Briefly the sea-carrier is answerable for all loss or damage which he might have avoided by a special personal care of the things delivered to him. This special care is beyond ordinary care and prudence. It does not follow that the carrier is bound to exercise this extraordinary care, but that he omits it at his own risk[2].

It is difficult, however, to realize the 'maxima utilitas' of the application of such a principle. Its separation from the normal obligation of 'diligentia' is so subtle, that one wonders why for practical purposes it should be considered necessary.

[1] Das Recept. Naut., Zeitschr. f. HR. iii., especially p. 115, Verantw. des Schuld. Zeitschr. xvi., especially pp. 328, 329, 369.
[2] Lehrbuch des Pandektenrechts, 1890, ii. s. 384 and note 6, s. 264 and note 9.

Goldschmidt[1] admits that between these two liabilities there is no fixed line of demarcation; probably he may sympathize to some extent with Gerth in the latter's recent attempt to define 'vis maior' with greater precision.

Exner declares that the existence or non-existence of actual negligence has been the only question entertained by those Courts which have avowedly based their decisions on the dominant doctrine. The result is that the liability 'ex recepto' is assimilated to that 'ex locato[2].'

It might seem that Dernburg had minimized this difficulty by bringing into prominence the element of precaution in stationary arrangements. The carrier, he says, like others who carry on permanent occupations, can make fixed arrangements in the maintenance of his business organization against all loss which can be foreseen or prevented. If damage result through the imperfection of such arrangements he is held liable, although there is no 'culpa' in the particular case[3].

Although this mode of regarding the subject puts the sphere and purpose of the liability in a clear light, it appears to involve a differentiation between 'culpa' and the non-exercise of professional experience and prudence which seems hardly warranted. As Exner observes, the actio 'ex locato' would have furnished a sufficient remedy for damage so occasioned. The surgeon who has injured his patient in the performance of an operation through the employment of defective instruments is liable for negligence, although he made the best use of the instruments he possessed[4].

Dernburg has replied that a distinction must be drawn between imperfect arrangements in a particular matter and imperfect arrangements in general business organization. This he illustrates by referring to an accident at Steiglitz, where, owing to the smallness of the station platform, a man fell on to the rails and was run over by a passing train. The single passenger could not have required the erection of a larger platform on the strength of his single contract, there has been no negligence on the part of the company; if the railway company is liable such a liability is 'sine culpa,' and illustrates the nature of 'custodia' in the strict sense[5].

This explanation has not passed without comment. Hölder asks whether those who carry on a trade do not owe the same duty to individuals employing their services as they do to the public.

[1] Zeitschr. f. HR. iii. pp. 369, 384, 385.
[2] Der Begriff der höheren Gewalt, 1883, Grünhut's Zeitschr. x. pp. 519–527.
[3] Preuss. Privatrecht, 1882, ii. s. 69 (a), p. 160; Pandekten, 1886, ii. p. 104, note 6.
[4] Grünhut's Zeitschr. x. p. 524.
[5] Begriff der höheren Gewalt, 1884; Grünhut's Zeitschr. xi. p. 343.

Was not the land-carrier in Rome bound 'ex locato' to take precautions against robbers, if he knew that the district through which he would have to pass was infested with them[1]?

It has also been asserted that Dernburg's separation of negligence in fixed trade arrangements from negligence in particular matters is impracticable; that if the railway company knew of the dangerous character of the platform, and did not remedy it, there was actual negligence; and that further the principle of measuring responsibility 'ex locato' by the amount of the individual payment, which some expressions of Dernburg might appear to suggest, would be destructive of commercial law[2].

These criticisms are not altogether satisfactory. They somewhat lose sight of the main point, which is that the law may exact precautionary measures from those carrying on certain trades beyond any which would, in the absence of special legislation, be established by the ordinary, prudent man. Dernburg himself cites a German law of 1871 which illustrates this. Baron[3], however, distinguishes this law on the ground that it refers exclusively to arrangements for the preservation of human life and health. Although a pecuniary liability is eventually imposed, this is a secondary matter, and no compensation can atone for injury in those respects. No such obligation to use precautionary arrangements has ever been imposed in respect of goods, damage to them stands in a different category, it is capable of precise valuation and a fitting subject of compensation.

This objection of Baron's does not appear to me to be tenable. Under powers conferred by our Contagious Diseases (Animals) Act, 1878, both land and sea-carriers are required to take special precautionary measures in respect to the conveyance of animals.

But with regard to legislation of this nature in England two points must be noted. In the first place, the Courts do not appear to consider that the carriers are thereby placed under a liability 'sine culpa' with respect to freighters. If an accident of the nature the legislation was intended to prevent occur through the omission of a statutory precaution, the freighter may allege negligence generally, and 'use the act as some evidence of what is due and ordinary care' on the part of a carrier[4]. In the second place, the precautions exacted are of a definite or ascertainable nature.

Thus, as regards the mode in which cattle should be conveyed

[1] Krit. VJSchr. für Gesetzgeb. u. Rechtswiss. 1886, xxvi. p. 536 et seq.
[2] Gerth, Der Begriff d. vis maior, 1890, p. 115.
[3] Archiv für civ. Pr. lxxviii. pp. 301, 302.
[4] See *Gorris* v. *Scott*, L. R. 9 Ex. 125, and cf. per Pollock B. at p. 130 with *Blamires* v. *Lanc. and York Ry. Co.*, L. R. 8 Ex. 288, per Brett J., and per Grove J. at p. 289.

by railway companies, it has been found necessary to describe the covering, the buffers, the condition of the floor of the vehicle containing them, the stations at which food and water supplies shall be available, together with numerous other particulars [1]. If such details are necessary where the precautionary arrangements are simply directed to the preservation of the health of cattle, how great particularization would be necessary if, as Dernburg suggests, precautionary arrangements had to be made against every kind of accident.

In the trades in which such obligations were imposed, the number and nature of the requisite arrangements would tend to become definitely fixed; so that 'vis maior,' as denoting the point at which responsibility ceased, would vary with particular trades rather than with particular circumstances. But it is difficult to understand how the law could demand that all precautions generally against every kind of accident to goods conveyed should be taken without requiring insurance against all accidents.

A more serious objection against Dernburg's explanation of the scope and nature of the sea-carrier's liability is raised by Hölder [2]. Why was the innkeeper or sea-carrier liable where no precautionary measures were possible or where none could be reasonably expected? He illustrates this by the case of a traveller coming to an inn where all the rooms are engaged. The traveller, however, consents to sleep in a room in which another traveller has been placed. In the morning he finds that his companion and his watch have disappeared together. It is difficult to base the innkeeper's liability in such a case on any omission of precautionary measures.

Finally, the subjective theory fails to explain why the possibility of special precautions proving ineffectual did not present itself to the Roman jurists [3], as it did afterwards to mediaeval writers [4].

I do not think that any attempt to introduce the dominant interpretation of 'damnum fatale' into English law would be successful. Where it prevails the determination of the question whether an event is or is not 'vis maior' is a matter for the judge alone. If this determination presents difficulty to a man of his legal training, it would be hopeless to expect any assistance from an ordinary jury.

This may be illustrated by an incident in *Nugent* v. *Smith*; a case in which the liability of common carriers was afterwards much discussed.

[1] See the Animals Order of 1886, part iv.
[2] Krit. VJSchr. f. Gesetzgeb. xxvi. p. 537 et seq., and see further Baron, l. c., 298 et seq.
[3] E. g. in D. 19. 2. 13. s. 6, and see Baron, l. c., 299.
[4] E. g. Customs of the Sea, c. 23, and Roccus, Notab. d. Nav. note 58, &c.; Straccha 48 and others, cited by Emerigon, c. xii. s. 4, subs. 7.

Five questions were put to the jury with the object of ascertaining the existence or non-existence of the liability of the defendant, as a sea-carrier, in the particular suit[1]. The last of these was, 'Were there any known means, though not ordinarily used by people of ordinary care and skill, by which the defendant could have prevented the injury?' The result is suggestive. 'This question the jury did not answer.' And it would appear unnecessary to suppose that any subjective criterion other than the 'diligentia boni patrisfamilias' is indicated by the term 'act of God[2].' While eliminating the element of human intervention, it only denotes 'losses . . . which cannot be guarded against by *ordinary* exertions of human skill and prudence.' It is sufficient for the carrier to make use of 'the known measures to which prudent and experienced carriers *ordinarily* have recourse[3].'

I turn now to the objective theory of 'vis maior,' which has received a scientific development in Exner's 'Begriff der höheren Gewalt.' According to Exner, 'vis maior' denoted in Roman law such events as 'vis tempestatis calamitosae,' 'incursus hostium,' and others mentioned by Ulpian in D. 19. 2. 15. s. 2. Loss arising from these causes was out of the expected course of life, and the event was in this sense 'casus cui resisti non potest.' No difficulty was likely to arise in proving that such a phenomenon had occurred[4]. When the praetor, in accordance with the suggestion of Labeo, granted an 'exceptio' to the sea-carrier in cases of shipwreck and piracy, the 'exceptio' would in each case particularize the event which the defendant urged in exoneration, e. g. 'nisi per vim piratorum [res] perierunt.'

Exner advances the following suggestions in support of this proposition. The state had previously made specified and particular events a ground of exoneration[5]. If a general plea of 'damnum fatale' had been permitted, some definition of so important a term would have been necessitated, in order that the events which came within the 'exceptio' might be ascertained. No such definition has come down to us. Gaius attempts to elucidate its meaning by the Greek term 'θεοῦ βία[6].' The term never acquired a technical sense, but was employed in a manner similar to that in common use[7]. Exner therefore holds that the 'exceptio' was 'in factum,' and considers this suggested by the text D. 4. 9. 3. s. 1. Consequently

[1] 1 C. P. D. at p. 21. [2] Cf. per Cleasby B.; 1 C. P. D. at p. 443.
[3] Per Cockburn C.J. in *Nugent* v. *Smith*, 1 C. P. D. at pp. 437, 438; and cf. Story, Bailments, s. 512 (a).
[4] Grünhut's Zeitschr., 1883, x. pp. 553, 567–574, and especially 568, 569.
[5] See supra, note 5, p. 120. [6] See l. c., p. 502, n. 3.
[7] And see Columella 1. 7; Pliny, Nat. Hist. 18. 28. 69; and also Cicero, Pro Plancio, xlii; but cf. Gaius D. 18. 6. 2, and thereon Dernburg, Grünhut's Zeitschr. xi. p. 339.

the question whether an event was or was not 'vis maior' would be determined 'in iure' before the praetor. This determination would be without any examination of the circumstances of the particular case, or of the degree of care and prudence exercised by the carrier, so that only an objective character could have been attributed to 'vis maior[1].' To suppose that 'vis maior' was dependent on the care exercised in the individual case, would be to imagine that all the advantages of the edict had been swept away by the introduction of the 'exceptio.' The principle of the 'receptum' was introduced to eliminate all question of 'culpa' or 'diligentia' in the particular case. It was unlikely that the praetor would raise up again the difficulties in matters of proof from which he had previously escaped[2]. Moreover, according to the subjective theory, a theft showing extraordinary astuteness might be 'vis maior,' yet this view did not present itself to the Roman jurists. Paulus states without qualification, 'nautae actio furti competit, cuius sit periculo[3].'

Exner thus arrives at the conclusion that although the praetor placed event after event under the category of 'vis maior,' the conception remained unformulated in Roman law[4]. He attempts to accomplish what the Romans left undone. His result is that an event in order to be called 'vis maior' must possess two essential characteristics[5].

B. 1. Firstly, the damage must be produced within the sphere of the carrier's undertaking ('im Betriebskreise') by a force which originates outside that sphere: 'vis autem est maioris rei impetus... necessitas imposita,' D. 4. 2. 2 and 1.

B. 2. Secondly, the event through which the damage was produced must prima facie belong to a class entirely distinct from those which one expects in the ordinary course of life. The extraordinary character of the event will on the one hand make it easily capable of proof, and on the other irresistible under ordinary conditions[6].

The standard of 'vis maior' being thus entirely objective, it is possible that in a very few cases 'vis maior' and 'culpa' might co-exist. When this occurs 'vis maior' exempts the carrier from the insurance responsibility, yet the liability 'ex locato' remains. The carrier will therefore be liable for his negligence[7].

In proceeding to examine these two criteria, it must be admitted at the outset that they do not faithfully represent the

[1] Exner, l. c., 529, note 36. [2] Ibid. l. c., 529, 549, also 542–548.
[3] D. 4. 9. 4. pr., and see D. 47. 2. 14. 8. 17.
[4] L. c., 550; cf. Dernburg, Grünhut's Zeitschr. xi. 337, and Bähr, Krit. VJSchr. xxviii. 40; Gerth, l. c., 6; otherwise Baron, l. c., 290.
[5] L. c., 582. [6] L. c., 565, 566. [7] L. c., 574–578.

views of the Roman jurists[1]. Their value lies rather in their rendering the carrier's liability more definite and ascertainable than others previously suggested.

B. 1. As regards the first criterion, there are passages[2] which speak of 'damnum quod extrinsecus contingat' and 'extraria vis,' but such expressions hardly indicate an essential characteristic of 'vis maior.' Moreover the adoption of such a criterion would increase the carrier's liability, and its application would often produce arbitrary, if not inequitable, results. If a railway accident occurs through the sudden illness of an engine-driver the test would not be satisfied, but if through his being struck by lightning, we should have an example of 'vis maior[3].'

B. 2. In the second criterion Exner lays too great stress on the unusual character of the event. His view might appear to be supported by Ulpian in D. 19. 2. 15. 8. 2.

'Servius omnem vim, cui resisti non potest, dominum colono praestare debere ait . . . sed et si uredo fructum oleae corruperit aut solis fervore *non adsueto* id acciderit, damnum domini futurum, si vero nihil *extra consuetudinem* acciderit, damnum coloni esse.' But the reason of the decision simply is that the extreme heat, if usual, must already have been taken into account in fixing the rent, and cannot therefore be a ground of 'mercedis remissio.' Ulpian is giving effect to the presumed intention of the parties, he is not fixing a criterion of 'vis maior.' 'Damnum fatale' is generally, but not necessarily, unusual. Robbery by brigands must have been comparatively frequent in some places, even during the Empire, yet 'latrocinium' is always cited as an example of 'vis maior.' Further, the more one attributes to 'vis maior' an extraordinary and unusual character, the more distinct becomes the separation between it and 'casus,' so that it becomes difficult to explain those texts in which 'culpa' and 'damnum fatale' are apparently coterminous[4].

This objective theory has however no lack of advocates[5]. Hölder considers both the above criteria, on the whole, well founded, but refuses to admit that they are sufficiently exhaustive and precise to preclude an examination of the individual case[6]. Another writer accepts them with the modification that 'vis maior' denotes not merely an event, but a purely accidental event. The inevitable nature of 'vis maior,' and the fact that it is completely

[1] So Windscheid, ii. p. 401.
[2] E. g. D. 39. 2. 24. 8. 3, D. 19. 2. 30. 8. 4.
[3] And see Stintzing, l. c., p. 428.
[4] See supra, p. 123, and Dernburg, Grünhut's Zeitschr. xi. p. 338.
[5] Leyen, Zeitschr. f. HR. xxxiii, 1887, p. 433; Attenhofer, Rechtsgutachten i. S. der Gotthardbahn, 1884; Scholten, Overmacht, 1886.
[6] Krit. VJSchr. xxvi. p. 535.

independent of the volition of the party pleading it are thus emphasized [1]. This view approaches in one respect even more closely than Exner's to the English conception. 'Vis maior' in this sense cannot co-exist with 'culpa,' but, like the 'act of God,' presupposes its absence [2].

Exner's views have attracted much attention on the continent. Works of practice have carefully examined them [3], German and Austrian courts have taken notice of them, and a recent writer has advocated their adoption in French law.

In the discussion to which they have given rise, a new literature has sprung up, devoted to the examination of 'custodia,' and the liability of carriers in Roman law. Even before the appearance of Exner's 'Begriff der höheren Gewalt,' several jurists had defined 'damnum fatale' without reference to any subjective criterion [4]. Pernice pointed out that the 'custodia' for which the sea-carrier is liable had never been referred to any standard of 'diligentia.' The plea of 'vis maior' was only available when the damage had been occasioned by events which were in their nature inevitable, such as the forces of nature 'quibus humana infirmitas resistere non potest,' and certain misfortunes caused by man [5]. Brinz [6] also took the characteristic of inevitability as the objective criterion of 'vis maior.' It therefore denotes events which are generally inevitable, as distinguished from those which only become so by reason of particular circumstances. The former class comprise not only events against which no 'custodia' is conceivable, but also those against which no 'custodia' is possible without giving up the undertaking or using quite extraordinary precautions.

These somewhat vague conceptions [7] have more recently been developed by a pupil of Brinz. According to this writer [8] an event which has caused damage is not a ground of exoneration unless the person pleading it can show (1) that the event was not occasioned through 'culpa' on his part, and (2) that all due efforts were made to resist or avoid it. But if there are certain events known to be irresistible, it is only necessary to examine the particular case for the purpose of ascertaining whether 'culpa' existed in the first particular (1). Such events are denoted by the term

[1] Hafner, Ueber den Begriff der höheren Gewalt im deutschen Transportrecht, 1886.

[2] See definition per James L.J. in *Nugent* v. *Smith*, 1 C. P. D. at p. 444.

[3] See especially Eger, Frachtrecht, 1888, i. 259 et seq., and works quoted.

[4] E. g. Weis, Bemerkungen zu dem receptum der Wirthe, 1868; Arch. f. prakt. RW., N. F. v. p. 280 et seq., p. 237 et seq., and especially pp. 361–368; Wächter, Pandekten, 1881, ii. p. 446, n. 1. On Barca's views, see infra.

[5] Pernice, Labeo ii. 345–347. [6] ii. s. 68.

[7] See Exner, l. c., 5 | 3.

[8] Bruckner, Die custodia nebst ihrer Beziehung zur vis maior, 1889, p. 253 et seq.

'vis maior,' and are irresistible either (*a*) because, besides being unforeseen, they are of such a power that *active* resistance would have been out of the question had they been anticipated, or (*b*) because simply they are unforeseen [1].

B. 3. The criterion of 'vis maior' therefore consists in the fact that it denotes events which cannot be foreseen, and in support of this is cited [2] the passage from Ulpian in D. 17. 2. 52. s. 3: 'Damna quae imprudentibus accidunt, hoc est damna fatalia, socii non cogentur praestare ...' To this passage I shall return presently. Meanwhile it seems sufficient to observe that the examples furnished in the sources do not bear out the criterion suggested. 'Furtum' is as unforeseeable as 'effractura latronum,' but it is not 'damnum fatale.' The intervention of a private individual in D. 2. 11. 2. s. 9 need no more be anticipated than that of a state official, yet the latter can alone be classed as 'vis maior.' Even where a calamity was so far foreseen that the bailee had time to preserve the goods entrusted to him, it is nevertheless called 'damnum fatale [3].' Moreover it is difficult to fix any standard which would distinguish events which would generally be called foreseeable from those which would not. Whether an event was or was not foreseeable must depend largely on the particular circumstances of the case, and not on any abstract characteristic of the event itself [4].

B. 4. The only general characteristic of the examples given in the sources is, as Baron points out, their irresistibility [5]. This, however, must be understood in a commercial, rather than in a scientific sense. He distinguishes irresistibility from inevitability on the ground that the law does not impose on the bailee the duty of removing the object of bailment to some place beyond the sphere in which 'vis maior' may be expected to act. Such an obligation would interrupt the performance of the bailee's contract, and necessitate disproportionate expense. The bailee is exonerated so long as there is no 'culpa' to prevent him availing himself of the plea of irresistibility. In examining the events given as examples in the Corpus Iuris, he notes that they include not only natural events, but also acts of overwhelming human force, such as loss by pirates and acts of state. The former class are especially 'casus,' of which, in opposition to prevailing views, Baron makes the negation of human volition the essential element [6]. To the irresistible 'casus' is assimilated irresistible human force. In discussing isolated instances he admits that brigands might sometimes be

[1] Bruckner, p. 283.
[2] Ibid. p. 280; so Pernice, Labeo, ii. 374, n. 9.
[3] D. 13. 6. 5. s. 4.
[4] So Gerth, l. c., 150–152.
[5] Die Haftung bis zur höheren Gewalt, 1892; Archiv f. d. civ. Pr. lxxviii. v. s. 11.
[6] L. c., p. 284 et seq.

driven back, but this was not a possibility from the ordinary contractual standpoint [1]; the 'incendium' was always 'vis maior' because the Romans regarded it as the conflagration of immovables, the independent conflagration of movables possessed comparatively small importance. When the liability for technical 'custodia' was elaborated by the jurists they unfortunately restricted it to movables, hence 'incendium' remained outside this liability [2].

As regards the objective character of 'vis maior,' Baron shows that the texts speak of it not only passively, 'cui resisti non potest' (D. 19. 2. 15. s. 2) [3], but also actively, 'cui humana infirmitas resistere non potest' (D. 44. 7. 1. s. 4). So that it is not the powerlessness of the individual but of mankind which is considered. It has already been observed that no subjective explanation can be considered satisfactory, and that Exner from a different standpoint is also led to an objective interpretation.

Various general expressions of the Roman jurists seem to point in the same direction [4]. And it is in accordance with this view that the possibility of the co-existence of 'vis maior' and 'culpa' is alluded to in the Corpus Iuris [5].

But leaving out of consideration rare occasions on which that which was generally irresistible became, through special circumstances, resistible by the 'bonus paterfamilias'; 'culpa' and 'vis maior' would be concurrent (α) when position within the field of operation of 'vis maior' could be attributed to fault [6].

A second case, however, seems possible (β) when 'vis maior' is not of such a nature as to remove the chattel from the control of the person in charge of it, but is only a force causing deterioration. The extent of depreciation may then depend on the conduct of this person, so that 'culpa' and 'damnum fatale' may again co-exist.

But 'vis maior' (when a ground of exemption to bailees) is generally considered as taking the movable altogether from the bailee's control, whether by carrying it away or by suddenly destroying it. Here 'culpa' can exist only in the first particular (α). If this be negatived, or if position within the field of operation be considered without reference to circumstances leading up to such position, there can be no possibility of negligence, and 'vis maior' and 'culpa' are properly put in opposition [7].

Thus in certain cases 'vis maior' may be a ground of exoneration, because it negatives the possibility of 'culpa.' But there is

[1] Baron, l. c., pp. 294 and 295.
[2] And cf. D. 13. 6. 18 pr., C. 4. 65. 28, C. 5. 38. 4.
[3] L. c., 295–297.
[4] Thus cf. Labeo, D. 39. 2. 24. s. 4.
[5] Ulpian, D. 17. 2. 52. s. 3, D. 13. 6. 5. s. 4; Gaius, D. 3. 5. 21.
[6] I. 3. 14. s. 2; Paulus, D. 13. 7. 30; Gaius, D. 13. 6. 18 pr.; and see Ulpian, D. 17. 2. 52. s. 4; D. 19. 2. 11. s. 1.
[7] E. g. D. 2. 13. 7 pr.; D. 13. 7. 30.

another way in which it furnishes a ground of exemption, viz. where it gives effect to an intention of which the law takes cognizance. It is in this latter respect that the conception was regarded by Seneca:

'Sponsum descendam, quia promisi; sed non si spondere me in incertum iubebis, si fisco obligabis. Subest, inquam, tacita exceptio: si potero, si debebo, si haec ita erunt. Effice, ut idem status sit, cum exigis, qui fuit, cum promitterem: destituere levitas erit. Si aliquid intervenit novi, quid miraris cum condicio promittentis mutata sit, mutatum esse consilium? Eadem mihi omnia praesta, et idem sum. Vadimonium promittimus, tamen deserti non in omnes datur actio: deserentem vis maior excusat[1].'

Here 'vis maior' excuses performance; its non-occurrence is an instance of the 'tacita exceptio.'

Now in the case of bailment it is the intention of the contracting parties to which the law endeavours to give effect—'nam hoc servabitur, quod initio convenit (legem enim contractus dedit)[2].' Here, as elsewhere, 'subest, inquam, tacita exceptio: si potero.' To resist 'vis maior' is impossible, hence the textual sequence '... incendia, aquarum magnitudines, impetus praedonum a nullo praestatur.'

It is only where the occurrence of 'vis maior' is the condition of an obligation whose subject-matter is (say) payment of indemnity[3] that 'vis maior' ceases to be an implied exception. In every other case it must be understood as outside the contemplation of the contracting parties, and its non-occurrence the most striking instance of the 'tacita exceptio' which Seneca describes. But from denoting a particular instance of the implied exception 'casus maior' might very naturally come to denote the implied exception itself. This has happened with 'act of God' in English law (in so far as it is said to excuse performance of contract).

'Vis maior' would thus have provided a convenient name for a conception which suffered from lack of one, and which can only be generally described as indicating 'an event which' (in the words of Sir Frederick Pollock) 'as between the parties and for the purpose of the matter in hand cannot be definitely foreseen or controlled[4].' There is hardly sufficient evidence to say whether this extension was fully effected, but the before-mentioned passage from Ulpian (D. 17. 2. 52. s. 3), the way in which samples of 'vis maior' are mixed up with implied references to the intention of the contracting parties in D. 19. 2. 15. s. 2[5], and the citation of

[1] De Beneficiis, IV. xxxix. ed. Gertz, p. 86.
[2] Ulpian, D. 50. 17. 23.
[3] See C. 4. 23. 1; D. 19. 2. 9. s. 2.
[4] Principles of Contract, 6th ed. p. 397.
[5] See supra.

examples of 'vis maior' as illustrations of 'casus fortuitus' (I. 3. 14. s. 2; C. 4. 24. 6), which is said to be unforeseeable, are all, it seems to me, indications of a tendency in that direction. Where however 'damnum fatale' denoted an exception to a liability imposed by law independently of particular contract (as in the case of the 'receptum') it must (like 'act of God' in a similar case) have always preserved its objective signification.

The sea-carrier was therefore liable unless an accident occurred which was irresistible 'in abstracto'; and by 'irresistible' I understand something which could not be resisted even if apparent in contradistinction to something which could have been prevented if only its operations had not been secret [1], e. g. 'furtum.'

To the Roman conception of 'damnum fatale' there are, however, two serious objections. In the first place, it does not preclude the possibility of fraud and collusion.

Acts of overwhelming human force are irresistible, but it might be convenient for the bailee, now and then, to assist in their operations. Hence it had to be noted that 'vis maior' was only a ground of exoneration 'si nihil dolo . . . acciderit' (D. 17. 2. 52. s. 3, and see D. 19. 2. 9. s. 4).

In the second place, the criterion adopted is not sufficiently precise. 'Vis tempestatis calamitosae' is doubtless 'damnum fatale' (D. 39. 2. 24. s. 4), but what should we say about Vivian's 'minima tempestas' (D. 39. 2. 24 s. 10)? Mice are not to be considered irresistible (D. 19. 2. 13. s. 6), but why should we draw the line at jackdaws and starlings (D. 19. 2. 15. s. 2)? It is everywhere difficult to fix the point at which 'vis maior' comes in.

Exner's criteria, although they depart from the classical signification of 'vis maior,' are much more definite and precise, and I hope to show hereafter that 'act of God' is not open to either of the objections I have just mentioned.

For the reasons stated I arrive at the conclusion that the adoption of the Roman conception in modern law can never be attended with beneficial results [2].

Other definitions of 'vis maior' have been suggested [3], but those which appeared to me especially important have now been examined in detail.

[1] Cf. Pliny, xviii. 28, 69.

[2] So Gerth, l. c., 211; and see Bähr in Krit. VJSchr. xxviii. (1886), p. 409. Gelpke (Gutachten über die Frage: Empfiehlt sich die Anwendung des Begriffs der höheren Gewalt im bürgerlichen Recht?) discusses the whole question.

[3] See Stintzing, Archiv f. civ. Pr. lxxxi. (1893), pp. 462, 463; and cf. with note 4, p. 134; also Von Hollander, Vis maior als Schranke der Haftung nach römischem Recht, 1892; but thereon Stammler, Sächsisches Archiv f. bürgerliches Recht, iii. (1893), pp. 70, 71, and Bruckner, Krit. VJSchr. xxxvi. 403.

The liability of the carrier by sea, like that of the carrier by land, could be modified through special agreement, through mora, or through misconduct respecting the object carried. The Roman law on these points is the same as that applicable to bailees generally, and has therefore been already discussed in the pages of this REVIEW [1].

It is not, however, on the ground that innkeepers and sea-carriers could contract themselves out of their severe responsibility that Ulpian [2] replies to any alleged harshness of the edict, but by saying 'nam est in ipsorum arbitrio ne quem recipiant.' This somewhat curious reason is apparently in conflict with another passage [3], in which Ulpian declares that an innkeeper is not at liberty to refuse accommodation to passing travellers, 'nec repellere potest iter agentes.' If Ude's theory [4] could be accepted, according to which 'recipere' only means to take over responsibility and the 'salvum fore recipere' of the edict indicates nothing but a praetorian pact, difficulties would vanish. But 'recipere' here signifies to receive the person rather than the higher liability in respect of him or his property [5], and the harmonizing of the two texts may still afford exercise for scholastic ingenuity [6]. The glossators, followed by Cujas, Pothier, and Glück, read 'neminem recipere' instead of 'ne quem recipiant.' In other words, sea-carriers must carry for all who applied to them, but no one need be a sea-carrier. Guyet [7] supposed the first passage referred to the persons 'qui habitandi causa recipiuntur,' and the second to those 'qui hospitio recipiuntur.' But the opinion usually accepted is, that Roman innkeepers and sea-carriers were under no obligation to receive or carry for all who applied to them, and that the 'nec repellere potest iter agentes' merely signified that such a course would be detrimental from a business point of view [8].

The question whether the liability for all loss or damage unoccasioned by 'vis maior' was applied to other classes of persons besides those mentioned in the edict has given rise to very different expressions of opinion. Goldschmidt and Dernburg regard the liability as anomalous. With Windscheid and Brinz it is not anomalous, but it is not to be considered as frequently imposed. Baron and Bruckner perceive indications of its existence in

[1] Schuster, Liability of Bailees, L. Q. R. ii. p. 195 et seq.
[2] D. 4. 9. 1. s. 6.
[3] D. 47. 5. 1. s. 6.
[4] Das receptum nautarum ein pactum praetorium, Zeitschr. der Sav. Stift. xii. (1891); see pp. 70, 71.
[5] Cf. D. 4. 9. 1. s. 1 and 3 pr.; Baron, l. c., p. 239, note 56.
[6] On the question see Madai, Sind Gastwirthe wirklich berechtigt Reisende abzuweisen? Linde's Zeitschr. xviii. p. 376; and briefly Carnazza, Il diritto commerciale dei Romani, 1891, pp. 109–112.
[7] Archiv f. civ. Pr. xvii. 41.
[8] See Vangerow, iii. s. 648. n. 1.

nearly every variety of bailment. The reasons, both of practical justice and of commercial expediency, in favour of imposing on trade bailees a responsibility far beyond that of one for personal negligence are ably set forth by Baron in a chapter ('Die inneren Gründe') of the work I have frequently referred to. Pernice[1] considers that the liability for 'custodia' had a wide application in early times, but that after Hadrian the stricter liability was retained in comparatively few cases.

The whole subject of 'custodia' I desire to reserve for a separate work. It need only be remarked that it seems to me unlikely that a responsibility which involved the liability of master for the torts of free servants and employees could ever have been applied to bailees without this latter liability surviving[2] in all cases in which the duty of 'custodia' had originally existed.

The first case in which a master was made unconditionally liable for the torts of his employees would be when the praetor issued the edict 'naut. caup. stab.' It is true that in the 'actio in factum ex recepto' for the simple value of the thing lost, stolen, or damaged, this liability was not separated from the master's liability for acts of passengers or guests. The distinction was only effected when a penal action was brought for double the value of the thing in question ('actio in factum, in duplum'). In that case the sea-carrier was no longer considered liable for the doings of passengers, and the innkeeper ceased to be answerable for the tort of a passing guest[3].

Afterwards in the contract 'locatio operis' the principle of the liability of master for servant was adopted and given to the world as a distinct conception. Gaius recognizes it in his tenth book on the provincial edict in describing the liability of a carrier by land:

'Qui columnam transportandam conduxit, si ea, dum tollitur aut portatur aut reponitur, fracta sit, ita id periculum praestat, *si qua ipsius eorumque, quorum opera uteretur, culpa acciderit*: culpa autem abest, si omnia facta sunt, quae diligentissimus quisque observaturus fuisset.' D. 19. 2. 25. s. 7.

Some writers have considered that the sea-carrier's liability for technical 'custodia' is extended to the carrier by land[4], but this view has not met with general acceptance[5]. The controversy surrounding the interpretation of the 'que' in the 'eorum*que*,

[1] And see Bierman, Custodia und vis maior, Zeitschr. d. Sav. Stift. xii. (1891), p. 33.

[2] Cf. its extension in English law, Holmes, 230; and see Code Napol., arts. 1727, 1384; Baron, l. c., 223 et seq., 215 et seq.

[3] D. 4. 9. 6. s. 3; D. 47. 5. s. 6; and see Denisse, Du Contrat de Transport par Mer en Droit romain, pp. 36, 37.

[4] Baron, l. c., 257; Lehmann, Zeitschr. d. Sav. Stift. ix. (1888), p. 118 et seq.

[5] On the question see Goldschmidt, Zeitschr. iii. p. 352 et seq.

quorum opera uteretur' will not here be touched upon. The view adopted is that of Dernburg and Brinz, in opposition to the theory of Goldschmidt and Windscheid [1].

The 'conductor operis' is liable for his own 'culpa'; he is also liable for the 'culpa' of his employees so far as it occurs in the execution of the work. The responsibility of master for servant has passed from the sphere of the 'familia' to that of commercial enterprise.

It would be interesting at this point to consider how far the principles of agency were recognized in the relation of ship-masters to ship-owner, firstly by means of the 'actio exercitoria,' and afterwards in the privileges granted to ship-owners engaged in the immense grain traffic. But the examination of this, as of other points in maritime law, would be beyond the scope of this article. Where English rules of affreightment have had a Roman origin this may be more conveniently ascribed to them in dealing with the history of those rules themselves.

In considering the general liability of the carrier, one perceives that in Roman law it is especially remarkable for the wide application it affords to the principle of vicarious liability. The sea-carrier is responsible for the torts of passengers and crew, the ship-owner on the contracts of the masters made within the scope of their employment, the land-carrier for the negligence of his assistants. Yet this principle was always in opposition to conceptions of abstract justice, and only to be tolerated on strong grounds of expediency. Even primitive justice [2] recognized the separation of the offender from the unoffending in the practice of noxal surrender. The paterfamilias, to save himself and family from undiscriminating vengeance [3], delivered up the offender to the injured party. Long afterwards the Romans not only endeavoured to isolate the offender from other persons, but the blameworthy state of mind from other states of mind. It is said that it is beyond the power of human law to take into consideration the personal equation of the individual. However that may be, the isolation just mentioned was successfully effected in the creation of that abstract entity the ordinary, prudent man, and the doctrine of basing civil liability on fault elaborately developed. This doctrine was even applied to animals in determining the liability

[1] Dernburg, ii. p. 102; Brinz, ii. p. 278; Goldschmidt, Verantw. des Schuldners für seine Gehülfen, Zeitschr. xvi. (1871), 287–382; Windscheid, ii. p. 461; and cf. Stintzing, l. c., 441, n. 26.

[2] See Girard, Les Actions Noxales, 1887 and 1888, Nouvelle Revue Historique de Droit, xii. at p. 51 et seq.; Leist, Graeco-italische Rechtsgeschichte, 1884, p. 500.

[3] Girard, l. c., p. 40 et seq.; Bekker, Aktionen, p. 183 et seq.

of their owners[1]. It is not therefore surprising to find Gaius endeavouring to explain the vicarious liability of the sea-carrier for the acts of his assistants on the ground that the selection of such persons remained in his own hands[2]. And perhaps at the present day the continuing influence of the doctrine may be detected in the attempts of recent writers to interpret 'vis maior' by reference to the question of 'diligentia.'

Doubtless, the basing of liability on 'culpa' represents an ideal the realization of which in all jural relations is, in the abstract, greatly to be desired[3]; yet in certain cases, as we have seen, the Romans extended the application of vicarious liability. Some writers have attempted to explain several of these cases by reference to 'custodia' conceptions formed at a time when the ideal was as yet unrecognized, but a better reason is found in motives of commercial expediency and difficulties arising from the non-isolation of the individual in the increasing complexity of human relations.

The riddle of the sea-carrier's liability in Roman law has now been placed before the reader; yet, in concluding this article, attention may be drawn to a matter not unconnected with the same problem. I refer to the connexion between contracts relating to the carriage of goods and contracts of loan. From early times the sea-carrier bought the merchandise which he conveyed with borrowed money, and his obligation to repay this loan was absolute.

And in the 'foenus nauticum' the lender took over only a limited risk of the sea damage, while in other respects the carrier continued to bear the whole risk. So that the idea of having to pay for damage or loss to the goods carried out of his own pocket was familiar to him long before he played the part of a bailee and came under the provisions of a praetorian edict.

In ancient law one perceives widespread traces of this connexion between contracts of loan and contracts of carriage. According to some writers[4] the Babylonian contract of affreightment was nothing but a variety of loan, and the freight paid in advance represented the money lent. At a much later period Ulpian speaks of advanced freight as 'vecturam quam pro mutua acceperat,' and it appears from the rescript of Antoninus which he quotes that if the ship were lost this loan could be recovered from the

[1] See Vangerow, iii. p. 597; and cf. Scaevola in D. 9. 1. 1. s. 11, with D. 9. 2. 52. s. 1.

[2] D. 44. 7. 5. s. 6.

[3] See Goldschmidt, Zeitschr. iii. p. 89.

[4] Revillout, Sur le droit de la Chaldée cont. tab. nos. 95, 28, and 30, pp. 448 et seq. Appendix to Les Obligations en Droit Egyptien.

carrier[1]. And through the Middle Ages advanced freight was still regarded as a kind of loan[2].

We see the same connexion between contracts of loan and contracts of transport in the maritime loan of the Athenians, which the speeches of Demosthenes[3] in shipping cases have rendered familiar to us, and the principles of which transaction were subsequently borrowed by the Roman lawyers[4].

Everywhere the carrier is a needy man, and a man generally despised. Centuries before the Christian era the orthodox Hindu dared not sit at meat with him for fear of losing caste, nor had his reputation improved when in the days of Ulpian a reference to his nefarious propensities was considered a sufficient explanation of the edict.

One naturally desires to examine how far this condition of the sea-carrier affected his liability in legal systems earlier than that of Rome, but the necessary data for such an investigation are wanting. All that can be said is that the law of carriers is no new thing. With care and with forethought its elements were fashioned in the marts of Babylon, on the shores of the Indian Ocean, and amid the isles of Greece. The elements thus fashioned did not completely disappear with the civilizations under which they first received an external existence, for in the Roman system some important conceptions of earlier transport law formed in association a more complex law of affreightment than can previously have existed. We have yet to see how, when the Roman power passed away, the principles developed beneath its protection were in their turn preserved to form in new combinations a law of sea-carriage even more vast and complex. Labours for sake of justice were thus not lost:

> '. . . that which was Good
> Doth pass to Better—Best.'

J. B. C. STEPHEN.

[1] D. 19. 2. 15. s. 6; and see Labbé, Difficultés relatives à la perte de la chose due, no. 109, quoted by Denisse, l. c., 75 et seq.

[2] Cujas, Observ. lib. iii. ch. 1, Kuriche Quaestiones 34; Emerigon, ch. viii. s. 8. subsect. 2.

[3] Orations against Dionysodorus, Zonothemis, Phormio, and Lacritus, but on the last Schoeffer, Demosthenes und seine Zeit, iii. pt. ii. p. 286, note 3; and on the whole question, Dareste, Du prêt à la grosse chez les Athéniens, Revue Historique de Droit Français, xiii. p. 5 et seq.

[4] D. 22. 2; C. 4. 33; so Pardessus, Lois Mar. i. 70; Goldschmidt, Untersuchungen zur D. 45. 1. 122. s. 1, p. 6; Matthias, Das Foenus Nauticum, p. 4.

THE HISTORY OF THE PATENT SYSTEM UNDER THE PREROGATIVE AND AT COMMON LAW.

NOTWITHSTANDING a general admission of the theoretical importance of an acquaintance with the principles and practice of the patent system under the common law, it will, nevertheless, be allowed that in practice the Statute of Monopolies has been regarded as the first and final source of authority. In 1827, however, when the subject of patent law reform first began to claim the attention of the Legislature, an effort was made by the Lower House to secure more accurate and positive information. In this year the Crown, in compliance with a resolution of the House, ordered a return to be prepared 'of the titles and dates of all special privileges and patents granted in England previous to March 1, 1623, and stating whether for English or foreign manufactures and inventions.' Unfortunately, the resources of the Keepers of the National Records proved unequal to the demands made upon them; and as a matter of fact the return was never presented. The resolution, nevertheless, deserves to be rescued from the oblivion into which it has fallen. For, while on the one hand it excludes as foreign to the inquiry an investigation of the commercial privileges of the trading companies[1], it includes all grants made in respect of manufactures or inventions irrespective of the nature of the privileges conferred therein. In other words, we are told to look, not for Monopoly patents in the etymological sense of the words, but for grants made in furtherance of particular industries. With this clue to guide us we shall at once proceed to inquire, firstly, at what period the Crown by means of its grants first actively interfered in the promotion of industry, and secondly, what relation these grants may be found to bear to the first recorded Monopoly patents of invention. For this purpose we may briefly summarize the conclusions which may be obtained from a perusal of any standard history of industrial progress in this country.

During the period of history known as the Middle Ages, the industrial attainments of the English were far below the level of their continental rivals, France, Germany, Italy, Spain and the Low Countries. Moreover, throughout Europe progress in the manufacturing arts is found to be due, not so much to individual experimental effort, as to the slow infiltration of improved

[1] See note on p. 153.

processes, the source of which is ultimately traceable to the more advanced civilization of the East. As late as the sixteenth century the type of English society was mainly that of a pastoral and mining community, exchanging its undressed cloth, wool, hides, tin and lead for the manufactures of the continent and the produce of the East. The rise of the native cloth industry in the fourteenth century gave to this country her first considerable manufacturing industry: and, inasmuch as the development of the industry is universally attributed to the fostering influence of the Crown, it will be necessary to scrutinize somewhat closely the various grants by means of which these results were obtained. For the facts here presented no originality is claimed. Their connexion, however, with the history of patent law has never yet been properly established.

In the letters of protection to John Kempe and his Company, the text of which is here reproduced from Rymer, will be found the earliest authenticated instance of a Royal grant made with the avowed motive of instructing the English in a new industry.

Pro Johanne Kempe de Flandria, Textore Pannorum, super Mestero suo exercendo.

A. D. 1331. Pat. 5 Ed. III, p. 1, m. 25.

REX Omnibus Ballivis, etc., ad quos, etc., Salutem . . .

SCIATIS quod, cum Johannes Kempe de Flandria, Textor Pannorum Lancorum, infra Regnum Nostrum Angliae causa Mesteri sui inhibi exercendi et illos qui inde addiscere voluerint, instruendi et informandi, accesserit moraturus et quosdam Homines et Servientes ac Apprenticios de Mestero illo secum adduxerit, .

SUSCEPIMUS ipsum Johannem, Homines, Servientes ac Apprenticios suos praedictos, ac Bona et Catalla sua quaecumque, in protectionem . . . . . .

PROMITTIMUS enim nos aliis Hominibus, de Mestero illo, ac Tinctoribus, et Fullonibus venire volentibus de partibus Transmarinis, ad morandum infra idem Regnum nostrum ex causa praemissa, consimiles litteras de Protectione fieri facere debere.

IN CUJUS, etc. quam diu Regi placuerit duraturas. Teste Rege apud Lincolniam, vicesimo Tertio die Julii. . . . . .

Here we have, not a solitary instance of protection, but the declaration of a distinct and comprehensive policy in favour of the textile industry; for the grant contains a general promise of like privileges to all foreign weavers, dyers and fullers, on condition of their settling in this country and teaching their arts to those willing to be instructed therein. Nor is this all. In 1337 these letters patent were expressly confirmed by a statute framed for the protection of the new industry, cap. 5 of which enacts, that

all clothworkers of strange lands, of whatsoever country they may be, which will come into England, Ireland, Wales, and Scotland, and within the King's power, shall come safely and surely and shall be in the King's protection and safe-conduct to dwell in the same lands, choosing where they will; and to the intent that the said clothworkers shall have the greater will to come and dwell here, Our Sovereign Lord the King will grant them franchises as many and such as may suffice them [1].

As it is with the continuity rather than with the success of the new policy that we have here to deal, we shall briefly enumerate in their chronological order the grants which appear to have been issued in furtherance of the above object. In 1336 similar letters were issued (10 Ed. III, Dec. 12) to two Brabant weavers to settle at York in consideration of the value of industry to the Realm. In 1368 (42 Ed. III, p. 1) three clockmakers of Delft were invited to come over for a short period. In the following reign we are informed (Smiles, Huguenots, p. 10) that the manufacture of silk and linen was established in London by the king by the introduction of similar colonies from abroad, but whether by letters patent or otherwise has not been ascertained. The first instance of a grant made to the introducer of a newly-invented process will be found in letters patent dated 1440 (18 H. 6. Franc. 18. m. 27) to John of Shiedame, who with his Company was invited to introduce a method of manufacturing salt on a scale hitherto unattempted within the kingdom. Twelve years later, in 1452, a grant was made in favour of three miners and their Company, who were brought over from Bohemia by the king on the ground of their possessing 'meliorem scientiam in Mineriis' (Rymer, xi. 317).

These instances, although, probably, not exhaustive of the industrial grants of the fourteenth and fifteenth centuries, sufficiently illustrate the well-known citation from the Year Book, 40 Ed. III, fol. 17, 18, to the effect that the Crown has power to grant many privileges for the sake of the public good, although prima facie they appear to be clearly against common right.

With the alchemical patents of Henry VI, wrongly assigned by Hindmarch to the reign of Edward III, we must deal briefly.

[1] In the recent report of the Hist. MSS. Comm. xiv, pt. viii. p. 7, Lincoln, there is an ordinance dated May 1, 1291, which at first sight carries back this policy of encouragement to a still earlier date. It runs as follows; 'and that men may have the greater will to labour in the making of cloth in England, Ireland, and Wales, We will that all men may know that We will grant suitable franchises to fullers, weavers, and dyers, and other clothworkers who work in this mystery so soon as such franchises are asked of us.' The 'Athenaeum,' however, points out from internal evidence that the true date of the document is probably May 1, 1326. See also Calendar of Patent Rolls, 1327–30 under date May 1, 1327, where it appears that the first act of Ed. III was to cause a renewal of the 'Ordinance of the late king.'

In 1435–36 two successive Commissions were appointed to inquire into the feasibility of making the philosopher's stone for medicinal and other purposes. Respecting these Commissions we are assured by Prynne in his *Aurum Reginae* that they proved 'entirely abortive for aught that he could find.' The fiction of a monopoly having been intended, based upon an obviously inaccurate account in Moore's Reports, p. 671, may be dismissed as the invention of a later date. Other so-called alchemical patents resolve themselves into either warrants for the arrest of the individuals concerned, or dispensations from the penal statute of 5 Henry IV, by which the practice of transmutation was made a felony. In any case the connexion of these grants with the history of patent law must be considered as exceedingly remote.

With the accession of the Tudor dynasty the patent system underwent a change which divested it of all constitutional value. In place of the open letters for the furtherance of the national industry, we now find the Crown entering into secret negotiations for the purpose of attracting skilled foreigners into its own service. Amongst these we may instance the introduction of German armourers, Italian shipwrights and glass makers, and French iron founders. In the absence of any grants recorded in connexion with these transactions, it is impossible to define the precise relations existing between the Crown and the immigrant artisan. The Italian glass makers introduced circa 1550, i.e. under the protectorate of Somerset, were recalled by the Venetian State; but the French iron founders appear to have successfully established in the Weald district the art of casting iron ordnance, which shortly afterwards superseded the older forms of bronze cannon. The Tudor practice, however, must be regarded as a perversion of the mediaeval policy of the encouragement of industry; and it is to other causes that we must look for the reconstruction of the system by Elizabeth, in whose reign the principles of the modern patent system were first distinctly enunciated and carried into practice.

The rise of a capitalist middle class to wealth and political influence in the sixteenth century is ascribed to the disappearance of the old Nobility during the Wars of the Roses and the redistribution of monastic property under Henry VIII. The immediate effect of these changes is seen in the development of the native spirit of speculative enterprise and the rise of the Joint Stock Companies. The first instance, according to Professor Cunningham, of this class embarking in industrial schemes is to be found in the Statute 1 & 2 Phil. & Mary, cap. 14, A. D. 1555. From the preamble of this Act we gather that certain merchants of Norwich had by the introduction of Italian workmen so improved

the manufacture of Russels, Sattens, Satten reverses and fustians, that they were enabled to compete successfully with their foreign rivals. As a reward for their enterprise the merchants obtained a charter with a practical monopoly of the industry, together with other privileges. This class we shall now find undertaking in an hour of need to introduce under the direction of the Crown, but at its own charges, certain industries, the provision of which was considered indispensable for the safety and independence of the Realm. With this preface we propose to leave the grants to speak for themselves. The list, which has been prepared from the Patent Rolls and Calendars, constitutes the first attempt to fix the date of the introduction of the English patent system. It is, moreover, believed to be a complete record of the industrial monopoly licences issued during the period 1561–70[1].

No. I. 1561. Jan. 3. A lycense to Stephen Groyett and Anthony Le Leuryer to make white sope [for 10 years].

The best English soap of the period was the soft mottled Bristol soap, 'very sweet and good,' but unsuitable for fine laundry work, for which the hard Spanish soap of Castile was largely employed. The grant stipulates that two at the least of the servants of the patentees shall be of native birth, and that the soap, which is to be of the white hard variety, shall be as good and fine as is made in the *Sope house of Triana or Syvile.* The patentees are bound to submit their wares for the inspection of the municipal authorities, and on proof of defective manufacture the privilege is void. The grant appears in full in 'Engineering,' June 22, 1894, with a brief outline of the origin of patent law by the present writer.

No. II. 1561. Aug. 8. License to Philip Cockeram and John Parnes to make saltpetre [for 10 years].

At the date of the grant saltpetre was not manufactured within this country; most of the imported article arriving viâ Antwerp, a port controlled by the Catholic King of Spain. The Queen therefore bargained with Gerard Honricke, 'an almayne Captain,' to come over and teach her subjects 'the true and perfect art of making saltpetre' as good as that made 'beyond the seas,' stipulating, however, that the secrets of the manufacture should be reduced to writing before the promised reward of £300 should be paid. On the arrival of Honricke the Queen resigned her bargain (Pat. 3 Eliz. p. 6) into the hands of the above patentees, who were both London tradesmen. The specification will be found in full in 'Engineering,' June 15, 1894.

No. III. 1562. May 26. Privilege to George Cobham, alias Broke, for a dredging machine [for 10 years].

The patentee represents that 'by diligent travel' he had discovered a machine to scour the entrances to harbours, &c., to a depth of sixteen

[1] It should, perhaps, be stated that this list has been prepared from an examination of the entries on the Calendars of the Patent Rolls—all doubtful entries having been compared with the Rolls themselves. Its claim to completeness, therefore, rests upon the sufficiency of these Calendars.

feet. The patent is for the importation of a sufficient number of these machines. The rights of scouring channels by the older methods are reserved, and the Queen expresses a hope that her favourable treatment of the patentee 'will give courage to others to study and seke for the knowledge of like good engines and devyses.'

No. IV. 1562. Dec. 31. License to Wm. Kendall to make Alum in Devon, Cornwall, &c. [for 20 years].

In the recital of the grant Kendall represents that he had discovered ores of alum in abundance with a practical method of its extraction. The manufacture was started in Devonshire, but failed. *See under* 1564, July 3, Alum patent of Cornelius De Vos.

No. V. 1562. Dec. 31. Patent to John Medley for an instrument for the drayninge of water [for 20 years].

The recital states that mines of tin, lead, coal, &c., in Devon as elsewhere, were drowned and altogether unoccupied, 'owing the great habundance of water.' It is not clear that Medley lays claim to the invention of the device, although the grant covers all subsequent improvements. The rights of users of old machines are reserved, and clauses are inserted regulating the compensation to be paid for entering upon abandoned properties. In case of disputes arising, the quarrel is to be referred to the Privy Council. The source of inspiration of this and the numerous subsequent patents for mine drainage and water raising will be found in the illustrated work of Agricola published in 1559.

No. VI. 1563. Feb. 26. A license to George Gylpin and Peter Stoughberken to make ovens and furnaces [for 10 years].

In the S. P. Dom. 1565 there is a certificate from some London brewers, who testify to the economy of fuel effected by the furnaces of a German, Sebastian Brydigonne, who may have been connected with the above patentees. The grant refers to the growing scarcity of wood fuel, owing to the large consumption in the brewing and baking trades. The grant is void in case the patentees fail to *come over* and put the grant into practice within two months, or prove extortionate in their charges.

No. VII. 1563. June 22. A license to Burchsard Cranick to make engines for the draining of waters [20 years].

This grant is similar to that of Medley's, but gives some additional powers of entering upon old and abandoned mines under proper restrictions. The engine is stated to have been lately invented, lerned and found out by Cranick, and to be unlike anything devised or used within the realm. Three years are allowed for the patentee to perfect and demonstrate the utility of his engines. Disputes are to be referred to the Warden of the Stannaries and three Justices of the Peace.

No. VIII. 1564. July 3. License to Cornelius de Vos to make Alum and Copperas [for 21 years].

De Vos obtained this grant on the strength of the discovery of ores of alum and copperas (sulphate of iron) in the Isle of Wight (Alum Bay). His

rights were shortly afterwards assigned to Lord Mountjoy, who in 1566 obtained parliamentary confirmation of the grant. Both the Queen and Cecil were originally financially interested in the success of the experiment. In 1571 Bristol merchants complain of the decay of their trade owing to the fact that iron and alum, which had hitherto come from Spain, were now made better and cheaper in this country. See also Stow's Annals, 1631, pp. 897, 898; Geological Survey, Memoirs, Jurassic Rocks, i. 452–454. The grant confers the right to take up workmen at reasonable wages, together with all materials requisite for the manufacture.

Nos. IX, X. 1564. Oct. 10. Commission to Daniel Houghsetter and Thomas Thurland for mining in eight English Counties.

1565. Aug. 10. Special license to the same concerning the provision for the minerals and mines of gold, silver, &c.

This grant was the outcome of the action of the Queen, who early in her reign sent for expert German miners to revive the mineral industries of the kingdom. Thurland, master of the Savoy, appears to have acted as agent and go-between in the matter. Copper mining, practically a lost art, was at once started at Keswick on a large scale; the metal being required for the casting of bronze ordnance. The validity of the grant was challenged by the Earl of Northumberland on the ground that the work was within the Royalties granted to his family in a former reign. The case was decided in favour of the Queen, on the ground that the neglect of the Earl and his predecessors to work the minerals during seventy years 'had made that questionable which for ages was out of question' (Pettus, *Fodinae Regales*). On May 28, 1568, the Company was incorporated by Charter as the Society of the Mines Royal, which existed down to the eighteenth century. Houghsetter migrated to Cardiganshire, where valuable deposits of silver were discovered, and where he founded a family. See also Col. Grant-Francis, Copper-smelting.

No. XI. 1565. Jan. 29. License to Armigil Wade and Wm. Herlle for the manufacture of sulphur and oil [for 30 years] (Latin).

The full text of the grant will be found in Rymer. The sulphur was required for making gunpowder, and the discovery may be attributed to the labours of John Mangleman, a German, who was authorized to search for earth proper for making brimstone (Lansd. MSS.). The second part of the invention related to the extraction of oil from seeds for finishing cloth. The proper machinery for extracting oil from rape and other seeds does not seem to have been known at the period. The grant was subsequently reissued to Wade and another for a further term of thirty years.

No. XII. 1565. April 20. License to Roger Heuxtenbury and Bartholomew Verberick for Spanish leather.

Shoes of Spanish leather, i. e. yellow leather, appear to have been preferred 'to those which shine with blacking' (Howell, Letters, I. i. 39). The grant confers an exclusive right of manufacture, and dispenses with the provisions of an Act forbidding the export of leather. On the other hand,

it insists on the employment and instruction of one English apprentice for every foreigner employed, and subjects the industry to the inspection of the Wardens of the Company of the Leather Sellers, who are responsible for 'the skins being well and sufficientlie wrought.' This grant must not be confused with a subsequent license to Andreas de Loo to export felts which gave great offence to the trade.

Nos. XIII, XIV. 1565. Sept. 17. Two licenses to Wm. Humfry and Christopher Shutz to dig (1) for the Lapis Calaminaris, (2) for tin, lead, and other ores.

These grants covered geographically those parts of England not included in Houghsetter's patents and the Alum patent of De Vos. The calamine or zinc carbonate was an essential in the manufacture of latten or brass, which it was proposed to use in casting ordnance (S. P. Dom. Eliz. vol. 8, No. 14). The mineral was discovered in Somersetshire in 1566, and the first true brass made by the new process was exhibited in 1568. The patentees also erected at Tintern the first mill for drawing wire for use in wool-carding. In 1568 the Company was incorporated by Charter as the 'Company of the Mineral and Battery Works,' and remained under practically the same management as that of the Society of the Mines Royal (Stringer, *Opera Mineralia Explicata*). In 1574, and again in 1581, the assignees of the patent obtained an injunction against several owners of lead mines in Derbyshire for using certain methods of roasting lead ores in a furnace worked by the foot blast and other instruments invented by Humphrey after the date of his patent. The Court of Exchequer ordered models to be made, and after repeated adjournments a Commission was appointed to investigate 'the using of furnaces and syves for the getting, cleansing, and melting of leade Ower at Mendype, and the usage and manner of the syve' (Exchequer Decrees and Orders). The depositions in this case are still preserved, but it is impossible to trace the history of the case to its completion. Coke informs us that as regards the use of the sieve, the patent was not upheld on the ground of prior user at Mendip. It is a peculiarity of the grant that it covered all subsequent inventions of the patentees in this particular branch of metallurgy. The hearth was invented after the date of the patent, and one of the questions to be decided was whether a subsequent invention could be covered by letters patent or no.

No. XV. 1565. July 31. License to Francis Berty to put in practice the trade of making white salt.

The patent was surrendered and reissued in the following year.

No. XVI. 1565. Sept. 7. License to James Acontius for the manufacture of machines for grinding, &c. [for 20 years] (Latin).

Acontius was an Italian engineer who had taken out letters of naturalization and was in receipt of a small Crown pension. In 1559 he first suggested to the Crown that a monopoly was the most effectual method of rewarding an inventor. His suggestion appears to have borne fruit in the adoption of the monopoly policy in 1561; but Acontius did not receive his patent until this year. Cf. Antiquary, 1885; Ordish, Early English Inventions.

No. XVII. 1566. Jan. 23. License to Francis Berty for the making of salt.

Berty was a native of Antwerp, and probably introduced the Dutch mode of making salt for fish-curing. The salt was extracted by boiling in copper pans. Plans of the furnaces will be found in P. P. Dom. 1566. The later salt patents of the reign gave rise to great local discontent, owing to the oppression of the patentees, who claimed the right to control the price of salt within certain areas.

No. XVIII. 1567. Aug. 26. A special license to Peter Anthony van Ghemen [for 21 years] to cut iron, save fuel and extract oil.

In the Lansd. MSS. there is a declaration of the inventions of the above individual and his Company. They consisted of a process of tempering iron so that it might be cut into bars for various purposes, and of special mills for corn and for extracting oil from rape-seed, which for want of proper appliances was sent out of the kingdom to be extracted.

No. XIX. 1567. Sept. 8. License to Anthony Becku and John Carré to make [window] glass [for 21 years].

In 1557 English glassmakers were said to be 'scant in the land,' the seat of the manufacture, which was confined to small green glass ware, being at Chiddingfold. The French patentees were assured by the native glass-makers that they were unable to make the foreign broad or window-glass. This patent may be said to have laid the foundation of modern English glass-making; see Antiquary, Nov. 1894–May, 1895. It should be noted that the Crown had twice failed to manufacture glass on its own account. The patent insists on the instruction of the English as a condition of the validity of the grant.

No. XX. 1568. Nov. 10. License to Peter de la Croce (De la Croix) to make Cendre de Namour [for 7 years].

A patent for dyeing and dressing cloth after the manner of Flanders. English cloth was still exported in the white, undressed condition to be finished abroad. According to the 'Request of a true-hearted Englishman,' dated 1553 (Camden Miscellany), this was due to 'our beastlie blindness and lacke of studyous desire to do things perfectly and well.' But probably the trade was hampered by the absence of the subsidiary industries of oil, alum, &c.

No. XXI. 1569. Apr. 20. A license to Dan. Houghsetter to use the arte of myninge [for 21 yeares].

[See also patent dated Oct. 1564.] The grant is for setting up and using engines for mine drainage.

No. XXII. 1569. May 26. License to John Hastinges to make clothes called Frestadowes [for 21 years].

Frisadoes may be regarded as a variety of 'broad bayes,' but of a somewhat lighter character, and dyed and finished for the retail trade. The

patent therefore was essentially for dyeing and finishing cloth. Hastings' suit was supported by the Dyers Company, who reported that if English cloth were dyed within the country the Queen would gain £10,000 annually by the increased custom. The manufacture was established at Christchurch, but Hastings seems to have used his grant vexatiously by wantonly molesting the Essex weavers on the ground that the manufacture of baize came within the four corners of the patent. The matter was referred by the clothiers of Coggeshall to the Exchequer, when they claimed to have gained the day (S. P. Dom. Eliz. vol. 106, No. 47, and Noy, 183). Subsequently an agent of Hastings was brought before the Lord Mayor's Court for trespass, and was fined £9 for molesting a weaver within the jurisdiction of the city (S. P. Dom. Eliz. vol. 173, No. 28).

For the period 1570-1603 a mere summary must suffice. In 1571 Richard Matthew obtained a patent for knife-handles 'made of divers pieces of horn mixed with yellow or white plate,' which obtained for him a lasting reputation. The knives were to be stamped with the half-moon, indicative of their Turkish origin, on the blade and handle. The patent was disputed by the Cutlers' Company, who represented that they ought not to be restrained from using a slight improvement on an old industry, and the patent was not upheld (Noy, 183). In the same year Richard Dyer, an escaped prisoner of the Portuguese, secured a grant for the manufacture of earthen fire-pots, an art which he had learned in exile; his patent was renewed in 1579. In 1574 the art of making glasses after the Venetian fashion was introduced by Verselyn (Antiquary, March 1895) in the Hall of the Crutched Friars. In 1578 Peter Morris inaugurated the house-to-house system of water supply by forcing Thames water by a new engine at London Bridge (Antiquary, Aug.-Sept. 1895). These works continued to exist down to the removal of the bridge in 1822. Amongst patents of minor interest we may note grants for mine drainage, water supply, musical and mathematical instruments, milling machinery, sail-cloth, oils, salt, vinegar, starch, and saltpetre. The mention of these latter articles will be sufficient to remind the student of Elizabethan industry that we are approaching another and less pleasing aspect of the patent system, the main features of which are faithfully reflected in the report of the Monopoly debate of 1601, which has been handed down to us in the Journal of Simon D'Ewes. Into the merits of this agitation, however, we must for the present refrain from entering. The subject is complicated by considerations affecting the commercial rather than the industrial policy of the reign, an analysis of which would unduly extend the limits of this essay. We shall therefore conclude our survey by briefly indicating the chief points of difference in the position of the patentee under the Elizabethan and modern system respectively.

Under the mediaeval system of patent law the Crown naturally regarded itself as the sole patron and arbiter of the destinies of the new industry introduced under the protection and authority of its letters patent. But, with the acceptance by the Crown of the Monopoly policy advocated by Acontius in 1559, the responsibility for the introduction of new industries was by a gradual process of devolution shifted from the Crown to the patentee, upon the faith of whose representations the grant was both drawn and issued. The Queen, nevertheless, unconscious of the revolution which was being effected in the system, asserted and retained to the end of her reign her absolute right of jurisdiction in all cases of dispute arising out of these grants. But to dispute the Queen's licences before the Council or in the Court of Star Chamber or in the Exchequer constituted a risk which few individuals cared to run, as the Courts were apt to regard non-compliance with the requirements of the patentee as evincing a want of respect for the Queen's authority. In 1601, however, this position was challenged by the Houses, and a bill was prepared declaratory of the law upon the subject. This step wrung from the Queen a concession that her grants should be left to the law *without the force of Her Prerogative;* whereupon the bill was dropped. In 1602 the test case of *Darcy* v. *Allin* was heard; and with this case commences the history of the English common law patent system. Nevertheless, to this day the phraseology of the patent grant bears witness to the existence of that earlier period when patents were granted without application *ex mero motu et certa scientia* on the part of the Crown—when offenders were liable to penalties in the Queen's Court *for contempt of this Our Royal Command*; and when the power of summary revocation was committed to a quorum of six of the Privy Council, because at that period the right to challenge the validity of the royal grants in the Courts of common law had not been effectively established.

'All men of the law know,' said Bacon in 1601, 'that a bill which is only expository to expound the common law doth enact nothing.' Hence the common law rights of the importer remained unaffected by the Statute of Monopolies, which confined the legitimate exercise of the prerogative to the true and first inventor[1]. The choice of language employed by the framers of this statute appears to have been dictated not so much by a desire to restrain unduly the exercise of the prerogative as to avoid lending a semblance of legality to grants

[1] The connotation of the term 'inventor' has been unduly restricted. It is used indifferently in these grants with such phrases as 'the first finder out,' 'discoverer of useful arts,' &c. The word 'invenio,' I come upon, denotes primarily a physical act rather than a mental process. The Act sought to vest these privileges in those who had actually contributed to the introduction of the new art, to the exclusion of Court favourites and others.

which in future might be exercised to the public detriment. Be that, however, as it may, it is clear that, prior to this statute, the Crown and Courts alike recognized two classes of individuals, irrespective of their nationality, as the proper recipients of the royal favour, (1) the bringer-in or importer, (2) the first finder or inventor — the latter grounding his title to favourable consideration on the fact that he possessed in common with the importer the qualification of introducing a new industry within the realm. In other words, the rights of the inventor are derived from those of the importer, and not vice versa as is commonly supposed. A closer examination, indeed, reveals the fact that the inventor's rights were at first regarded as of doubtful validity where proof or probability could be adduced of the invention prejudicially affecting an existing industry; as in the case of Lee's application for the stocking-frame, which is said to have been rejected on the ground that the machine proposed to supersede manual labour. And in 1601, in the discussion on the bill 'for the promotion of good arts,' which proposed to invest in the introducer and improver alike a lifelong copyright of their invention, it was objected that all improvements were not profitable to the state, and that the granting of licences for small additions would breed confusion (D'Ewes, 678), the bill being ignominiously rejected upon the second reading. That the same view was held by the Queen's Courts is shown by two out of the three cases decided prior to *Darcy* v. *Allin*. In the Derbyshire lead-mining case the claims of the assignees of the patent of Humfry & Shutz were disallowed in the Court of Exchequer on the ground that it was 'easier to add than to invent,' the Court holding that the differences exhibited by the ore-sifting apparatus of the plaintiffs and that used at Mendip were insufficient to support the monopoly. A more important case decided before the Council is known as Matthey's case. The valuable nature of the improvement in Matthew's knife-handles was not disputed by the Cutlers' Company, for they alleged that the monopoly would be the ruin of themselves and their families and apprentices (Lansd. MSS.). The patent was not upheld, on the broad consideration that the object of the system was the introduction of new industries and not the displacement of old. The position of the improver, as is well known, was not finally decided until 1772.

But it is in respect of what constitutes a new manufacture that the divergence of modern patent law from the spirit of the old system is most clearly seen. The Elizabethan policy aimed beyond question, as a perusal of the grants will amply testify, at the introduction of those industries the products of which had hitherto figured most prominently in the list of imports, viz. alum, glass,

soap, oils, salt, saltpetre, latten, &c., &c. Now the proof of a single sale is held to be destructive of the novelty of the invention. So too with the case of disclosure by printed publication. In the sixteenth century the sole test of the monopoly contrary to the law, as defined by Coke, was that the grant should not seek to restrain the public of any freedom or liberty that they had before, or hinder them in their lawful trade. For all practical purposes therefore it was sufficient for the patentee to prove that the industry had not been carried on within the kingdom within a reasonable limit of time to render his grant unassailable on the score of novelty. The tendency of modern legislation to recur to the less exacting standard of novelty may be illustrated in the recent legislation of Germany, Austria, and the amending bill of last session.

On the nature of the patent grant the history of the Elizabethan monopolies throws some new light. The exclusive right of sale, which is supposed to be the kernel of the patent grant, is in point of fact subsequent to and derived from the sole right of manufacture, from which, in the earlier stages of the system, it was by no means an inseparable accident. On the contrary, with the exception of the grant to Verselyn, who obtained an exclusive control over the Venetian glass trade, the rights of the foreign merchant and the discretion of the buyer in the home markets were left absolutely unaffected by the terms of these grants, which, accordingly, must be considered as manufacturing and not as commercial privileges [1]. The statement that what is known as the working clause is unknown to English patent jurisprudence is now no longer tenable. Apart from the frequent insertion of clauses regulating the period within which the new industry was to be introduced, it is obvious that prior to the rise of the patent specification a privilege became void owing to non-working within a reasonable period on the ground of want of consideration. To the clauses stipulating for the employment of native apprentices may be traced the rise of the common law as to the term for which these exclusive licences could be legally granted. The statutory limitation of the term of the grant to fourteen years (Coke even favoured the shorter term of seven years) was avowedly based upon the consideration that the

[1] This point is important in view of recent readhesions to the theory of the patent grant advocated by Collier in 1803. (Cf. Frost, Robinson, and the U. S. Patent Centennial Vol. 1891.) According to Collier the patent is a commercial privilege, or right of exclusive sale, and derives its origin from certain analogous privileges supposed to have been conveyed by the Charters of the Mediaeval Trading and City Companies. It is now accepted that these charters were obtained in confirmation of certain prescriptive rights of self-government which had grown up without direct authorization of the Crown. These charters 'were never accounted a monopoly,' *Darcy* v. *Allin*, Noy, 182. In the charter of the Hanseatic League, see Anderson's Commerce, vol. i. p. 227.

patent should not operate in restraint of trade. It must be admitted that the Elizabethan grants undoubtedly erred on the side of generosity in this respect.

The occasional reservation of a small rent in compensation for the loss of customs concludes the last of the differences which we have found to exist between the two systems. These rents formed part of the consideration of the grant, whereas the modern patent fees are based upon a rough estimate of the cost of the civil establishment.

Within recent years a country, whose industrial and financial position bears at least a superficial resemblance to the England of Elizabeth, has copied on to its statute rolls a law which reproduces almost in its entirety the features of the Elizabethan industrial system. By the decree of September 30, 1892, the Portuguese authorities are empowered to grant monopolies for the manufacture of any new industrial products within the country, or for carrying out particular mining and metallurgical operations within certain geographical zones. A 'new industry' is defined as one not actually in process of working in the country at the date of the application. The grant does not affect the right of importation or sale of similar foreign products. The system is open to foreigners, and a proof of working is required within a definite period. As to the practical working of the system, little information is available at present; but that the law has not remained a dead letter is evident from the numerous applications made for these concessions, and already there are signs that the provisions of the law will be effectual in attracting foreign skill and capital to the country. The practical working of the system should be carefully watched with the view of its possible application to the fostering of certain colonial industries, the birth of which the bonus system has hitherto egregiously failed to stimulate.

E. Wyndham Hulme.

SCOTTISH LAND LAW[1].

THE late Mr. Robert Louis Stevenson used to tell a good story of an emphatic Southron whom once he met in a railway carriage, and who asserted boldly that there was but one system of law north and south of the Tweed. In vain Mr. Stevenson protested that he had passed examinations in both systems, and was even, in name, a Scottish practitioner. The absurdity of the thing was so evident, that his companion good-naturedly preferred to consider him as a humourist rather than a liar.

Readers of the REVIEW are, of course, many stages ahead of Mr. Stevenson's travelling companion; yet it may be questioned whether the knowledge of Scots law possessed by the average English lawyer goes much beyond the gleanings of the Scottish Appeal Cases, and the hints so freely scattered by the famous Scot who was great as a lawyer, greater as a romancer, and greatest of all as a man. At least the writer of these lines makes no claim to better equipment; and it is as an English rather than a Scottish lawyer that he welcomes Mr. Craigie's admirable volume. Admirable indeed, for though Mr. Craigie professes to write for practitioners only, he has earned also the gratitude of the student, by printing in his collection statutes repealed and unrepealed, and by giving to the word 'conveyancing' its very widest meaning. So that what we really get in his work is a statutory history of Scottish land law; and, with the aid of a few text-books, the English student can gather from it a very fair idea of Scottish land law as a whole.

This is a service to English law as well as to Scots law. For we are just coming to learn how valuable and interesting to English lawyers is the history of their own system; no mean beginning has been made towards the rolling away of that reproach under which we have been content so long to sit, that we, who should of all nations be most proud of our legal history, of all nations know least about it. And as it has been well said, that he who knows nothing but his Bible does not know his Bible, it may with equal truth be claimed that a lawyer who is ignorant of everything outside his own system cannot really appreciate that system as it deserves

[1] Conveyancing Statutes (of Scotland) from the Thirteenth Century to the Present Time, arranged and edited by John Craigie Edinburgh: William Green & Sons, 1895), 8vo, xvi and 763 pp.

to be appreciated. Wherefore, this being our point of view, Mr. Craigie will forgive us if in these lines we appear to regard Scottish law somewhat as a useful parallel to and illustrator of our own law.

No long study of the volume before us is needed to realize the cousinship (we might almost say the brotherhood) of the two systems, so far as land law is concerned. If in England we find our mediaeval law recognizing the tenures by knight-service, by serjeanty, by frankalmoign, and by socage; in Scotland we see almost the same tenures under their names of ward-holding, blanch-ferm, mortification, and feu. At once, however, we miss the important English tenure of copyhold, and its absence from the country in which the barony was every whit as real a thing as the manor in England must occasion no small surprise[1]. A conjecture may be hazarded, that in Scotland the settlers whom William's border followers found in possession of the Lowlands declined to accept the villein tenure which the course of events forced upon the English churl, and made good their claims to feu-rights, while in the Highlands the tenacity of tribal customs prevented the formation of manorial groups of cultivators. But, unfortunately, the event is equally consistent with a theory of the total expatriation of the pre-Conquest Lowlanders, for whom, therefore, it was not necessary to devise a special tenure[2].

Still, this fact is not sufficient to destroy the substantial identity of the two systems. Nor do we attribute any *fundamental* influence to the Roman law, notwithstanding that it appears to be alluded to, and followed, in at least one parliamentary utterance (1540, c. 1) as the 'common law,' and that it has unquestionably left its mark upon the body of Scottish land law. We see the Roman doctrine of 'servitude' struggling with the feudal doctrine of 'estate,' and apparently winning the victory. The Scottish leaseholder owes much of the comparative mildness of his law of distress to the adoption of the Roman notion of hypothec, in place of the feudal idea of seignorial ownership. In the Scottish learning of the liability of heirs for the debts of their ancestors, we trace the undoubted influence of Roman law.

Again, we may fancy Celtic influence in the (to us) peculiar rule of descent by which the heritage (now also the 'conquest'[3]) goes to the next younger, or, failing him, to the next older brother of the

[1] I have even seen the word *manerium* applied by a clerk of the thirteenth century to lands in Fife (*Rotuli Scotiae*, i. 42. 6). But then he was an English clerk.

[2] One may be pardoned for declining, with all due respect, to accept the suggestion of the late Professor Bell that the same right which in England became copyhold, in Scotland survived as 'rentallage' or 'kindly tenure.'

[3] 37 & 38 Vic. c. 94, § 37.

issueless deceased; and, in the 'rentallers' or 'kindly tenants' of the eighteenth century, before alluded to, we have, no doubt, a survival of clan customs.

Once more, the close connexion which long existed between France and Scotland may be suspected of some slight share in the moulding of Scottish law. We may trace it in the proprietary arrangements of spouses, in the organization of the Court of Session, and in the shadow, long surviving, of the *retrait féodal*.

But, in spite of all this, and much else, Scottish land law, like English land law, is, in the main, a body of Teutonic usage, imported by immigrants into a country which formerly knew it not, shaped and moulded by the local requirements of the situation into originality and character, at a later date powerfully affected by the dominant influences of caste and prerogative, then gradually defined and developed by the action of tribunals reflecting more or less faithfully the sentiments of the ruling classes, and, finally, reformed and simplified by the action of a central legislature.

All this makes such points of difference between the two systems, as do undoubtedly exist, the more interesting; for biologists have taught us that it is the minor rather than the major variations of species which are the most fruitful in suggestion. We may, therefore, light upon something of profit, if we institute a short comparison between a few of the parallel features in Scottish and English land law, taking by preference those in which there appears some obvious difference either of chronology or substance.

If, however, we begin by asking which of the two systems was the first to adopt those inevitable alterations of mediaeval practice which both have found to be necessary, in other words, which system may fairly be entitled to the credit of being considered the more advanced or progressive, we are fairly puzzled by a series of apparent inconsistencies. On the one hand, the requirement of writing for a transfer of feudal interests is in Scotland so old as to be undateable [1], while in England it is not older (as a compulsory rule) than the late seventeenth century. In Scotland there was a general Enclosure statute (doubtful sign of progress!) so early as 1695; in England we relied on commissions and local Acts until 1801. In Scotland the 'limited owner' received statutory powers of management as early as 1770; in England he was tied down by the terms of his settlement until 1856. And this is the more curious, that in Scotland the creation of a binding estate tail, with 'irritant and resolutive clauses,' seems to have been hardly possible before 1685, whilst in the south the statute *De Donis*, passed just

[1] The previous state of things is said to survive in the 'udal right' of Orkney and Zetland.

400 years earlier, had for more than two centuries been rendered harmless by the ingenious device for ever associated with the fictitious name of Taltarum[1]. In 1555 (c. 12) we get what may fairly be called a Scottish Agricultural Holdings Act (by the way, Mr. Craigie does not give us this statute), providing against summary ejectment of a tenant, even though the 'ish' has arrived; while the doctrine of 'tacit relocation' must have given the Scottish leaseholder much greater protection than that enjoyed by his English brother, to say nothing of the doctrine of hypothec, previously alluded to, which is undoubtedly a milder form of landlord's right than the analogous English law of distress. The Scottish law of leaseholds is, however, full of puzzles; for while leases were not made binding on 'singular successors' of the lessor till 1449, and could not therefore be strictly deemed real rights before that date, and while it is only of recent years, and still incompletely, that the right of alienation has been won for the leaseholder whose lease does not expressly authorize transmission, leaseholds have become (as they never have done in England) heritable property, and pass on intestacy to the heir, although they are (or were) claimable by marital and fiscal right as movables.

But most startling of all is it to find that dream of English law reformers, the registration of titles, in full realization north of the Tweed, not as the result of modern legislation, which has, in this case, merely improved an ancient practice, but as an inheritance from the Dark Ages. In more than one instance modern England has to pay the penalty for the precocious development of English law. Had our royal lawyers waited for the establishment of their master's courts until the royal law was recognized as universal and supreme, we should not have had two inconsistent systems of Law and Equity, professedly administered by the same ultimate authority, struggling side by side for supremacy during three or four centuries. And the modernness of English law, which so early discarded the materiality of investiture for the metaphysical subtleties of lease and release, turned the course of conveyancing into secret channels; whilst elsewhere the archaic *Auflassung* and the notarial infeftment with its register of sasines glided easily into a modern *Grundbuch* system of title-registration, without struggle and without bitterness.

On the other hand, Scottish legal history appears in more than one point to have lagged behind our own. With us the feudal doctrine of the non-devisability of land, early sapped by the invention of uses, was practically abolished by statute before

[1] [The name is Talkarum on the roll, and appears to be Cornish: see Mr. Maitland's note in L. Q. R. ix. 1.—Ed.]

the middle of the sixteenth century. But in Scotland, though to some extent evaded by the ingenuity of conveyancers, it flourished even in the present generation; and the English lawyer learns with surprise that it was not before the year 1868 (31 & 32 Vic. c. 101, § 20) competent to a landowner to regulate the succession to his estate otherwise than by a conveyance *de praesenti*. Nay, more, even a conveyance *de praesenti* which altered the succession was liable to be set aside by the heir if not made in 'liege poustie'; the ancient disproof of the charge implied in this *reductio lecti* being the picturesque test of going to or coming from kirk or market unsupported.

Again, in spite of an apocryphal statute attributed to Robert I, Scots law seems to have been long behind our own in according that free liberty of alienation *inter vivos* which is usually (perhaps unwarrantably) accounted the mark of a high civilization. Whether or no the Act of Robert really passed, it is quite clear that for centuries after the English statute of *Quia Emptores* had pronounced its resolute decision on the great alienation dispute, Scottish landowners were seeking by all sorts of methods to evade restraint. For when in 1469 (c. 36) a statute compelled superiors to grant infeftment to 'creditors-apprisers,' i. e. as we should say, judgment creditors seeking to enforce their securities, conveyancers were quick to invent a fictitious process by which the intending vendor of lands granted a bond for the amount of the purchase money, and then suffered judgment to be obtained against him upon it, the understanding being that the lands in treaty should be apprised by the purchaser under the statute. The severity of the prohibition is also evidenced by the substantial rights secured by the superior even after its abolition. For the 20 Geo. II. c. 50, the statute which corresponds with the English 12 Car. II. c. 24, while sweeping away the prohibition against alienation, yet expressly reserves all payments and casualties due to the superior on admission of his new vassal.

It is, however, but fair to say that the avowed purpose of the *Quia Emptores*, viz. the prevention of subinfeudation, seems never to have been realized in Scotland, a fact which, if it be a fact, may well account for the comparative indifference to the rule against alienation, strictly so called. For if, to use what we hope is correct Scots, the vassal may grant through a charter by progress a subaltern right to be held *de me et successoribus meis*, he will be the less anxious about his inability to effect a grant original of a public right, to be held *a me de superiore meo*. In fact he will be pleased to create for himself the comfortable incidents of a 'superiority,' and there seems to be no legal objection to his doing so, even at the present day.

We may refer also to the subject of succession, a matter in which,

as is well known, Scots law differs considerably from English. Here it would seem that the praise of merit must be divided Certainly the Scottish rules, which (at any rate until quite recently[1]) gave the 'heritage' and the 'conquest' in the first instance to different collaterals, which allowed the heir of line no share in the general movables of the deceased until his relations in equal degree had received equal value with himself, and which secured the *legitim* and *jus relictae* from a testator's caprices, may compare very favourably with the corresponding rules of English law. On the other hand, Scottish law, like the Roman (but with less excuse), struggled long in the meshes of the old theory which identified the heir with his ancestor and made him liable *in solidum* for that ancestor's debts, while it also, like the Roman (and perhaps with more justification), long demanded an elaborate process of 'service and retour' by the heir who claimed his ancestor's lands. Indeed, in this respect, the English law seems to be coming round to the view that it would be well if a dead man's realty were formally granted to his heir by some unmistakable evidence, such as Letters of Probate or Administration, instead of leaving the proof of heirship to future litigation. Nevertheless, it is strange to an English lawyer to find a Scottish statute of the year 1874 solemnly enacting that an heir shall not be liable for the debts of his ancestor beyond the value of the estate to which he succeeds, and a statute only six years older abolishing the mediaeval process of obtaining 'brieves' from the Chancery for service of heirs. And certainly, by its peculiar classification of property into 'heritable' and 'movable,' a division standing midway between Roman and English, the Scottish law did a good deal to accentuate the preference always accorded to sex and 'unigeniture' (if one may coin such a word) by feudalized systems of law.

Needless to say, we find all through Mr. Craigie's book traces of old customs which have played no small part in the development of legal history, and which even now, other-worldly as they appear, are of more than mere antiquarian interest. The right of 'thirlage,' or mill-jurisdiction, seems to have been much more elaborate and persistent in a country in which, even to the present day, agriculture supports a larger proportion of the people than in the more artisan and industrial south. Readers of Chaucer are familiar with the miller who

> 'Great soken had . . . oute of doute
> With whete and malt, of al the lande aboute,'

and the student of English legal history is aware of the existence, in times past, of the mill franchise. But a first book of English

[1] The change was made, we believe, in 1874 (37 & 38 Vict. c. 94, § 37).

law, written in the middle of the eighteenth century, would not (as Erskine does) have devoted many pages to an elaborate description of the right, with picturesque concomitants of multures, sequels and services, outsucken and insucken, terms which remind us, perhaps, somewhat unpleasantly, of the oppressive feudal rights which were abolished in France by the reforming hand of the first National Assembly[1]. Then, too, there is the fascinating subject of warranty, or 'warrandice,' which, at any rate in land law, carries us back to the time when the lord was really his vassal's protector, and maintained his gifts with the power of the sword. Herein the Scottish law, differing from the English, demanded, and, we believe, still demands[2], 'absolute warrandice' from every vendor selling for full value; and doubtless there is some better reason for the difference than mere leaning in favour of Roman doctrines. Of the process of outlawry, which, under its picturesque title of 'letters of horning,' played such a great part in Scottish as in other legal history of the Middle Ages, there is much to be learnt. In itself a relic of the time when the royal justice is but a very crude instrument indeed, stronger no doubt, but scarcely more exact than the customary system which it supersedes, it is found so useful that even in civil cases it appears to have been a normal remedy in Scotland till deprived by statute in 1747 (20 Geo. II. c. 50) of its most formidable effects. Not that we would in this particular claim any superiority for the English system which, apparently, used the process of outlawry as a preliminary step in trespass and debt down to the middle of the eighteenth century, when the *capias* and *exigent* seem to have been gradually superseded by the Bill of Middlesex and writ of *Latitat*. Finally, for we must be content to name only a few points, those interested in the still much disputed question of the origin of boroughs and burgage-rights may be advised to turn their attention to Scottish law. In England the comparatively early decay of the peculiar tenure in burgage, and the spread of parliamentary representation, have obscured the very strong case which can really be made out for the royal origin of boroughs; and the theory advocated by the late Dr. Hearn, that only boroughs actually *in manu regis* had, during the first century or two of our parliamentary history, a claim (or a duty) in the matter of representation, has received little support. But when we look across the border, and find there the distinction between burghs of royalty and burghs of regality thoroughly well understood in practice; when it is clearly only

[1] E.g. Blackstone, though he had every temptation, does not seem to mention the right.

[2] See Bell's Principles, § 894, and cases there quoted.

the former which, until quite recent years, have had parliamentary rights and a representative assembly of their own; when we find that, until so late as the year 1874, the borough was really an intermediary between the Crown and the tenant in burgage, constituting a separate entity for registration purposes; then we shall probably be inclined to admit that the theory of the royal or military origin of the borough, lately expounded by Professor Maitland in his criticism of Keutgen's work [1], receives additional confirmation from Scottish evidence.

It would, of course, be rash to attribute the many differences between two systems so obviously similar in general character to any one cause. But the writer of these lines may perhaps be pardoned if he takes the opportunity of suggesting a point, which he does not remember to have seen elaborated elsewhere, and which has occurred to him as worthy of some little attention.

In almost all cases (and they will be found to cover most of the countries of Western Europe) in which a conquering race has established itself in a territory already occupied by a settled civilization, the invader has found it necessary to establish a new system of courts of justice. And these courts have in due time produced what is, to all intents and purposes, a new system of law. But the new system of judicature has, practically, to choose between one of two alternatives. It may profess to be *omnicompetent*, or merely *auxiliary*. That is, it may either undertake the administration of justice in all its branches, or it may merely offer special remedies in particular cases. Now, as every one knows, the system of common law courts which was established by the Normans in England, speaking roughly, between 1150 and 1250, was of the latter type. The common law courts at Westminster were not, and never professed to be, what I have ventured to call *omnicompetent* courts. They found existing a system of local tribunals which may fairly so be styled, that is to say, a system of tribunals which professed to declare 'folk-right' in all cases. These courts were too strong to be totally and immediately overridden by a new judicial machinery. And so the king's courts contented themselves with setting up rival jurisdictions in detail, offering superior remedies for wrongs less adequately redressed by the local tribunals, and, in other cases, recognizing as wrongs injuries not so recognized by native law. The result was a curiously one-sided and partial system of jurisprudence. For, as might have been expected, the local courts faded away before the powerful rivalry of the new tribunals, which robbed them of much of their business, while, on the other hand, the original impulse which created the jurisdiction of the royal courts

[1] English Historical Review, No. XLI. p. 13.

seems to have died out just in the moment of victory. Thus, a considerable portion of the field of law was left uncovered, through the disappearance of the local courts and the failure in expansive power of their successful rivals. To cover this ground the only serious attempt made by the common law tribunals seems to have been through the writ of trespass on the case, which, though it ultimately gave us the action of *assumpsit*[1], the action for malicious prosecution, and other important remedies, can hardly be said to have fulfilled the expectations of the framers of the 24th chapter of the Statute of Westminster II, to which it owed its origin.

The gap was filled, partly by the Courts Christian, but, more effectually, by the Court of Chancery, the connexion between which and the old local courts, whose relinquished places it largely filled, has never been adequately worked out, though hints of its existence have from time to time been dropped[2]. At first, the Court of Chancery appears to have started on a career of omnicompetence, fettered only by its unwillingness to provide a duplicate remedy where one already existed at the common law. But even Chancery seems before very long to have become, if not a formulary, at least a precedent-bound tribunal (its failure to secure the jurisdiction in copyholds, which it obviously coveted, is a proof of its declining strength); and so England was again left without any court which professed to deal with the province of law as a whole.

The course of Scottish jurisdictional history was very different. Whether or no there were ever in Scotland any national courts corresponding with the old English moots of the hundred and shire, seems to be an open question[3]. But there appears to be little doubt that the movement which, in England, converted the sheriff into a purely royal official with vast jurisdictional powers, spread over the border, and produced similar effects in Scotland[4]. The existence of the sheriff is clearly recognized in the Ordinance for the Government of Scotland issued by Edward I in 1305, wherein twenty-five Scottish sheriffdomes are enumerated. Only, and here the important difference comes in, there appears to have been in Scotland nothing to correspond with that harrying of the sheriff, and his decline and fall, which are such marked features of the thirteenth century in England, and which ultimately succeeded in reducing the county court almost to the position of a shadowy background for the

[1] If the common law courts had recognized the action on the simple contract in the fourteenth century, they might have secured the jurisdiction in uses; for a use is, after all, a contract.

[2] E.g. by Sir Edward Fry in his preface to the third edition of his book on Specific Performance.

[3] See Dove-Wilson, Sheriff Court Practice, Historical Introduction.

[4] Probably the process resembled that which took place after the conquest of Ulster at the end of the sixteenth century.

sessions of the itinerant justices. In Scotland the sheriff kept his power undiminished in degree, though doubtless he suffered in a way by the lavish creation of regalities or feudal jurisdictions, which the weakness of the Scottish throne at a critical period was induced to sanction; and the 'judge-ordinary,' as he came to be called, presided over a tribunal which could take account of most civil and a good many criminal cases. Hence, there was in Scotland no pressing need for the establishment of a central court of justice; especially as the itinerant justiciars, who went through the country 'on the grass and on the corn' (i. e. in spring and autumn), disposed of the heavier criminal cases. And, as a matter of fact, no such central court was created till the sixteenth century. For we cannot regard the parliamentary Court of Session which existed from 1425[1] to the end of the fifteenth century as a professional court of justice.

But, apparently, at the beginning of the sixteenth century it was felt that the local jurisdictions of the sheriffs required supplementing by a strong and authoritative central tribunal, and in the year 1503 a statutory attempt was made to create a 'consale . . . quhilk sall sit continualy in Edinburgh or quhar the king maketh residence or quhar he pleseth to decide all maner of sumonds and civil maters complants and causes dayly.' This particular attempt appears to have been unsuccessful, doubtless owing to the premature death of James IV at Flodden Field, and the long minority of his son. But, on the latter's assumption of the reins of government, one of his first measures was (by statute 1532, c. 2) to institute a 'College of Justice,' consisting of fourteen persons, 'half spirituale half temporall,' and to give them power to 'sitt and decyde upon all actiouns ciuile.' Apparently, the new body worked well, for its existence was formally ratified by a statute of the year 1540 (sess. 2, c. 10), and it was ordered to 'remane perpetualie for the administratioun of Justice to all the liegis of this realme.' Moreover, the praetorian power was conferred on it of making Acts, statutes, and ordinations for ordering of process and hasty expedition of justice; and the long list of Acts of Sederunt, no less than many other of its works, attests the administrative, as well as the judicial, authority of the Court of Session.

Now it is very clear that courts such as those of the sheriff and the Session will take a view of their position widely different from that adopted by courts constituted as were the English common law tribunals. The latter, having no established system of law to guide them (for the Anglo-Saxon custumals must have begun

[1] By virtue of 1425, c. 19, and other statutes. It was really a Committee of Parliament.

already to appear out of date), and, doubtless long bearing in mind the originally subordinate character of their office, confined their attention to the hesitating process of writ-invention, or, it may be, in all except a few instances, of obeying writs invented for them by others. One apparent exception to the truth of this generalization exists. The doctrine that no man need answer for his freehold without a royal writ, though but procedural, is worthy of being called a principle. But the rule dates from the time before the common law courts, as courts, really existed, and is rather a governmental than a judicial rule. Speaking generally, a pious horror of anything that can possibly rise to the level of a principle has been one of the most conspicuous characteristics of the English common law courts, from their creation to the present day.

No such narrow spirit cramped the action of the Scottish courts. As was natural, the very width of their jurisdiction gave them a receptiveness foreign to their English contemporaries. Being unable to fall back upon the timid *non possumus*, they were constrained to admit all kinds of inspiration. Whatever be the sources of the *Quoniam Attachiamenta* and the *Iter Camerarii*, it is now pretty generally accepted that the *Regiam Majestatem* is a free paraphrase of Glanville's *Tractatus*; and it is not a little curious to observe that, in the Scottish paraphrase, the forms of writs which, in the original treatise, form so conspicuous a feature, are almost entirely omitted, so that 'The Majesty' appears as a statement of principles rather than as a mere body of directions to practitioners and officials. Likewise, the willingness of the Scottish courts to own their indebtedness to Roman and canon law stands in pleasing contrast with the professed hostility of the English tribunals; and it is not without significance, for example, that the *actio spolii* of the canonists, which, in England, is disguised and warped into the writ of novel disseisin, in Scotland is freely naturalized as the action of spuilzie. Other instances of receptivity might be quoted, but one shall suffice, taken this time from general Teutonic law. It is fairly well known that the continental Germans had, before the close of the ninth century, arrived at a very complete process of getting at landed property to satisfy the debts of its owner[1]. Briefly put, the process consisted in outlawing the defendant by means of the king's ban, and then seizing his property in the name of the Crown, which satisfied the creditors as an act of grace. Whether this process ever reached England, it is difficult to say; but it is pretty clear that, if it did, the feudal dislike to land alienation soon rendered it inoperative as a general

[1] The details are worked out by the writer in an article published in the English Historical Review, No. VIII. p. 417.

remedy, though it may possibly survive in the peculiar process open to the Crown for enforcement of its claims. Accordingly, it would seem that the ordinary creditor had no remedy against his debtor's lands (at least in his lifetime) until the statutes of Edward I gave him the writ of *elegit* and the rights of merchant and staple, which were, of course, very imperfect remedies. But the Scottish courts must have boldly adopted the Carolingian rules, for we find a statute of Alexander II directing that, on failure of the debtor to satisfy his creditor within fifteen days, 'the schiref and the king's servants sall sell the lands and possessions perteining to the debtor, *conform to the consuetude of the realm*,' while it required an express statute of 1469 (c. 36) to protect even the goods of tenants against their lord's creditor. And the process of 'apprising,' introduced by this latter statute, gave the creditor the power (ultimately abused) of taking the lands themselves, if no purchaser could be found.

With the absence of trial by jury also, which found no place in Scottish civil procedure till 1815, the constitution of her courts must have had much to do; but limits of space forbid further illustration of a point which is not intended as an assertion, merely as a hint towards the explanation of some otherwise puzzling differences between two fundamentally similar systems. When we find on the one hand a group of courts which really in their origin were little more than administrative travelling commissions, bidden to execute certain instructions, we shall not be surprised if these courts become pedantic and hesitating, eager for precedent to sanction every step, looking for guidance rather to exact *formulae* than to elastic principles, anxious to disclaim all power of law-making. And we shall not be surprised if the law which they administer betrays similar characteristics. On the other hand, when we find a system of courts inheriting an indefinable authority from custom or endowed with general jurisdiction by statute, we may expect to see them bolder in their application of principles, more open to outside influences, less deferential to precedent[1], willing to strain their process of law-making to the utmost[2]; and we shall be justified in looking for corresponding features in the law which they administer.

Finally, we can only regret that such an interesting and suggestive book as that compiled by Mr. Craigie should be rendered of comparatively little value by the absence of an index.

EDWARD JENKS.

[1] Erskine, writing in the eighteenth century, expressly denies that precedents are binding, even on inferior courts (Bk. I. tit. i). Imagine Blackstone propounding such a doctrine.

[2] Many of the Acts of Sederunt deal with large questions of law.

INDICTMENTS.

I SUPPOSE that it will be generally admitted that legal technicality of the old-fashioned kind finds its last stronghold in the criminal law, and practically centres round the construction of the indictments. I am not concerned to discuss at this moment why this is so, beyond pointing out that the fact is due in a large measure to one of the fundamental principles of the criminal law as at present administered, namely, that the prosecution can win only on the law and the merits, whereas the prisoner may get off on either. But I wish as far as possible to look forwards rather than backwards and to give reasons for believing that some of the most objectionable technicalities at present to be found in indictments are due to mere superstition, and might be abolished by the action of a sufficiently strong-minded draftsman. The point is of the more importance because as years go by it becomes more and more obvious that no real help in the matter can be expected from the Legislature. The reduction of indictments to a form which, apart from the technicalities of the law itself, would leave nothing to be desired, is a very simple feat to a competent draftsman. I need not recapitulate the efforts to bring about this end which have been made in the last twenty years; but taken with the general success of the very simple system of written accusations now obtaining in the case of offences tried summarily, they seem to show that the blame for the present state of things lies rather with the Legislature than with the lawyers. Since 1851, in fact, the Legislature has been almost absolutely quiescent in the matter. It has indeed interfered in two methods, one by allowing the offence to be set out in an indictment in the terms of the enactment by which it is constituted, the other by allowing a man indicted for one offence to be convicted of another. Neither of these principles have as yet received very wide application; personally I think both are unsound, although I am not unmindful of the thirty-ninth section of the Summary Jurisdiction Act, 1879. In the first case simplification of expression is procured by omitting to inform the prisoner of something which he has a right to know. For example, in an indictment under the Debtors Act of 1869, it is sufficient to describe 'the offence charged' in the words of the Act, and consequently it has been decided that a man may be

accused of obtaining credit by false pretences without being told what the false pretences are; and he might, I suppose, be accused of making a false entry in his business books without having it described to him. This seems to me to be distinctly contrary to justice, as although the accused is under such protection as is afforded by the Vexatious Indictments Act, it is quite open to the prosecutor to conceal the whole of his case till the moment when he begins to prove it. As regards the second case, I do not say that any unfairness is done at present; it may be right that a man who is accused of rape should be liable to be convicted of other somewhat similar offences; but the principle is a slovenly one, and as soon as it is made use of, as it may be at any time, to accuse a person of a more, in order to convict him of a less, serious offence, it will inflict very serious injustice.

Meanwhile what have the lawyers been doing to simplify matters? As regards indictments, besides proposing schemes requiring legislation, they have, I am ready to admit, not done as much as they might. They have in fact not yet taken all the advantage that they might take of such assistance as the Legislature has afforded them; a draftsman's first duty is to draft for safety, and if the old forms to be found in the proper places do not afford means of stating to the prisoner what is the crime of which he is accused, they are at all events likely to defy the ingenuity of his counsel. But two causes are at work among lawyers, which will, I think, end in making it possible to effect a very considerable change in the language in which indictments are couched without any help from the Legislature at all. In the first place there is a growing impatience of the technicalities of the criminal law, both at the Bar, where they are held to be disliked by the jury, and by the Bench, where it may be that their full beauty is not always appreciated. How far we have travelled in this direction may, I think, be shown by a reference to Frost's trial in 1839. Frost was tried for high treason on account of the share he took in the famous Newport riots. He was defended by two future law officers and Chief Barons, Pollock and Kelly. They began by threatening to sever their challenges and thereby forced the prosecution to try Frost without his associates, they objected to the jury being called in alphabetical order, and discussed the right of the prosecution to peremptory challenges under 6 Geo. IV. c. 50 till the end of the first day. The greater part of the next day was taken up by a dispute as to the proper delivery of a list of witnesses to the prisoner, at least three witnesses were examined on the *voir dire* to prove their misdescription, the conviction was eventually nearly nullified on the point as to the prisoner's list of witnesses, and

Pollock frequently took an opportunity to explain that he was really quite unfamiliar with the criminal law. Of course all the points he took would not be open to defending counsel to-day in any ordinary felony or misdemeanour; but I cannot imagine what would happen to a man who spent a day and a half in preliminary objections. I have never heard challenges severed any more than a challenge to the array. I have even been seriously rebuked by a most experienced judge for exercising my right to peremptory challenges in a sheep-stealing case tried in Wales. From these and other similar signs of the times it is safe to say that technicalities are unfashionable. But there is another reason for their decay, and that is sheer ignorance. A 'local description' is still necessary in certain cases, and it seems that its want cannot be cured by amendment, but I do not believe there are half a dozen men who would say off-hand what these cases are; an indictment must still be framed with 'certainty to a certain intent in general,' but what that expression means, except in very general terms, I do not believe that any living man either knows or cares. The fact is that, as a leading authority on the subject writes, 'the effect of these complicated and narrowly guarded amendments (i. e. those effected by the statute of 1851) was to leave the greater part of the law relating to indictments in a blurred, half-defaced condition, like a slate the greater part of the writing on which has been half rubbed out. . . . A general impression has been produced that quibbles about indictments have come to an end. It has ceased to be the fashion to make them, and if they are made they do not succeed.'

Under these circumstances I think that the time has safely come when a competent draftsman, having enough faith in his predecessors to believe that their pedantry was a descendant of sound sense, and in his ultimate judges to believe that they would sympathize with the spirit of his adventure, might venture to write indictments more or less in the language, say of the local official of to-day, and to make it nearly as plain to the ordinary citizen what the crime is of which he is accused, as does the rate-collector what is the sum which he is expected to pay for his rates. Two great principles, as I understand the matter, underlie all the learning that has ever existed as to indictments. In the first place, all the legal essentials of the alleged crime must be so set out as to distinguish it from any other; in the second place, the alleged facts constituting it must be described with enough exactness to support a plea of *autrefois convict* or *autrefois acquit*, according to circumstances. In other words, the prisoner should have notice of all the law and all the facts which will be cited against him. In considering

how this may be effected more satisfactorily than it is at present. I will first consider the more formal matters and then those of more substance, concluding with an example which will explain my meaning more than many precepts.

A leading question arising on nearly every indictment is how far words of art can safely be restricted; and the law being as it is, and for our purposes being presumed to be immutable, it is obvious that 'feloniously' and 'unlawfully' must keep their places to let the prisoner know clearly whether he is accused of a felony or a misdemeanour. The distinction is probably a matter of absolute indifference to him and everybody else, except possibly the jurymen, who run the risk of being locked up all night if the case is one of felony; but it must undoubtedly be made, and it may be argued in its favour that the word 'unlawfully' has been held to supply that negative to all legal exceptions to the guilt of the accused, which formerly often had to be so laboriously expressed in the case of summary convictions, and 'feloniously' has, I presume, the same effect. In regard to other conjuring words which are used for purposes quite irrespective of their meaning, the case is rather different.

As George II followed Elizabeth's example in providing a punishment for 'wilful and corrupt' perjury, I suppose that we must still allege that perjury was committed wilfully and corruptly, and can only regret that those monarchs did not restrain their language; 'embezzle' too is necessarily a sacred word, but in these cases the conjuring words are really no more than tags by which an accused man may, most inefficiently, be warned of the statute which will be invoked against him. On the other hand, in the case of common law offences, even when made punishable by statute, such as larceny and burglary, I doubt whether it would now be held necessary to amplify the technical word by applying its definition. 'Larceny' is a substantive to which the corresponding verb is 'to steal,' and stealing is rightly described as feloniously taking and carrying away. We must allege the felony in any case, but I believe that an indictment alleging that a man 'feloniously did steal' a watch would be good without alleging that he took and carried it away; and if any pleader regards my view as sacrilegious, I can quote the Year Books to prove that '"furat" fuit unum equum' is bad, apparently only because 'felonice' is omitted, and Coke to show that 'felonice cepit et asportavit' is good. The characteristics of burglary are well enough known to make a tiresome repetition unnecessary; as the particulars of the offence committed, such as some description of the house broken into, the time of the offence, and the felony which the prisoner intended to commit must all be given, and as

such detail is not only required by decided cases, but also by the principle of disclosing the facts of the alleged offence, it may be that it is impossible to avoid supplementing a technical word by its definition. But in the case of assault it is difficult to see why it should be considered necessary to add to a charge of attempting a battery, which is technically what an assault amounts to, a description of the battery itself, which is usually false. It is an offence to commit an assault; why then go on to charge that the accused did beat, wound, ill-treat, and do other wrongs to his victim, of the first three of which charges two are probably untrue, while the fourth is no crime? Such a statement seems to be always useless, and in the case of indecent assault may be actually misleading.

To any one familiar with indictments it is impossible to doubt that a good deal of their obscurity is due to the natural tendency of man to indulge in mere phrases. Though fifty years ago it was necessary to have recourse to the Legislature to enable draftsmen to omit such phrases as 'not having the fear of God before his eyes,' or 'at the instigation of the Devil,' as statements the truth of which it was not necessary to prove, I believe that simplicity of language is sufficiently valued by members of the High Court to make it possible to omit all archaic language from indictments so long as the two leading principles I have maintained above are scrupulously observed.

Simplicity of statement, however, does not depend merely or chiefly on the excision of archaisms. I believe that the High Court to-day would scornfully refuse to require any degree of certainty in an indictment higher than the lowest, namely certainty to a common intent, that is that they would read into the indictment any allegation which according to the common use of language it must reasonably be held to contain. This not only enables the pleader to discard 'the said' and such expressions in nine cases out of ten where they are now used, but enables him to attach a force to such words as 'falsely' and 'knowingly' which they deserve, and may in some cases enable him to omit a repetition of averments which is the feature which makes the longer forms of indictment the unintelligible nonsense that they are. I am aware that in the face of a decided case more than eighty years old I cannot seriously suggest that the word 'falsely' as it is ordinarily used in an indictment for false pretences has any meaning in law; I may allege that *A* knowingly and falsely pretended three things, but *R.* v. *Perrott* decides that I do not thereby allege that *A* falsely pretended any one of them, so that it is necessary for me to aver that the pretences are false and that *A* knew it. I know however of no

authority which prevents my making my averment in the lump, and I believe both that such an averment would be good, and that there would be a considerable chance of the High Court so holding it. Fortunately the action of the Legislature since the decision in *R.* v. *Perrott* gives strong ground for saying that that case does not apply to perjury, though it is decided on the analogy of the perjury indictments of that day, and of this fact I have taken full advantage below. I believe it is still the custom to conclude perjury indictments with a conclusion which is in fact merely a quotation from a statute, so as to bring the case within the protection of the Criminal Law Act, 1826, according to which the description of a statutory offence in the words of the statute makes an indictment good after verdict: I do not think that this slavish custom has been followed in other cases, and authority to show that it is unnecessary is plentiful. Other alterations in the framing of indictments are easily conceivable which are trifles in themselves, but which, taken together, seem to me to make all the difference between a document which is readily understood by all the world and one which is practically unintelligible to any one but an expert. It is difficult to explain what these alterations are, so I will try to make my meaning clear by giving an example of what I believe to be a good indictment for perjury, premising that I take the facts out of an authoritative book of precedents, while they are embodied in a document containing 1155 words, as against 298 in the following:

The County of Lancaster to wit.– The Jurors for our Lady the Queen upon their oath present that T. S., on the 20th day of December, 1894, unlawfully did commit wilful and corrupt perjury against the form of the statutes in such case made and provided, and against the peace of our Lady the Queen her crown and dignity; the facts of the case being as follows.

On the day referred to an information against S. K. for an offence against the Licensing Acts 1872 and 1874, namely selling intoxicating liquors on licensed premises at Bartonwood on Sunday the 11th of December, 1894, during prohibited hours, came on to be tried before a Court of Summary Jurisdiction sitting at Bartonwood, and was so tried in due course.

On the case being heard, T. S. having been duly sworn, swore and deposed as follows: 'I was never in the house (meaning thereby the licensed premises aforesaid, occupied by S. K.) at all that day (meaning thereby Sunday the 11th of December, 1894), and never saw the policeman (meaning J. T.) before in my life. I never was in Bartonwood (meaning Bartonwood in the said county) at all that day (meaning the Sunday aforesaid). I had not been in it (meaning Bartonwood aforesaid) for a fortnight before that day (meaning the Sunday aforesaid).

All these statements made by T. S. were untrue, as he knew when he made them, and he made them falsely, wilfully, and corruptly.

Whether S. T. was in the said house on the 11th of December, 1894, whether he had seen J. T. before that day, and whether he had been in

Bartonwood for a fortnight before that day, were questions material to the issue which the Court of Summary Jurisdiction had to decide on the hearing of the charge in question.

I think the foregoing is a fairly plain description of an offence, and that it is good as an indictment. At any rate without going into detail I submit it to the criticism of anybody who cares to take the trouble to examine it. I might have made it shorter still keeping within the bounds of the law, but there are some matters of which I have felt bound to give T. S. notice, though he is not strictly entitled to it.

Some of the changes I have suggested to my fellow craftsmen may be inconvenient, some may be actually wrong; and I do not expect that any one will be found bold enough to adopt them all at once. Some things are beyond our powers; we must vary our counts in such a way as to confound one another if possible so long as the law remains what it is, and we can no more combine misdemeanours and felonies than perform any other impossibility. But by remembering and observing the law we know, and by discouraging others from inquiring into the law which we have all happily forgotten, I believe we are capable of doing much to bring about a change which during twenty years the Legislature has shown itself incapable of effecting.

H. L. Stephen.

'EXECRABILIS' IN THE COMMON PLEAS.

TOWARDS the middle of Edward III's reign, just when the national movement against papal 'provisors' was coming to a climax, the king's legal advisers and the justices of the Court of Common Pleas took upon themselves to enforce a certain papal constitution, though to enforce it in an odd, lopsided fashion, favourable to their royal lord. The pope's weapons were to be wrested from his hand and used against him. The king was going to take possession of a great deal of ecclesiastical patronage which the pope had destined for himself. This clever move is partially revealed to us by certain discussions in the Year Books, which have never, I believe, been fully explained because they have never been compared with the plea rolls.

The constitution in question was none other than the famous *Execrabilis*, which fills a prominent place in the constitutional history of the Catholic Church. It is one of the stock examples of those covetously fiscal 'extravagants' which are characteristic of the Avignonese papacy. For some time past popes and councils had been legislating against pluralism, that is, against the simultaneous tenure by one clerk of more than one benefice involving a cure of souls[1]. Among the laws striking at this evil was a canon of the Fourth Lateran Council (1215), which began with the words *De multa*[2]. This canon is here mentioned merely because a tradition among English lawyers taught, and perhaps still teaches, that a reference was made to it in the cases which are to come before us; but we shall hereafter see that this tradition has its origin in a mistake. Legislation, however, was futile. The popes themselves made it futile by their dispensations, and those who do not like popes tell us that the laws were made in order that they might be dispensed with. At last, in November, 1317, John XXII issued a long and stringent constitution whose first word was *Execrabilis*[3]. It was stringent; it was retrospective; it attacked those clerks who were already holding several 'incompatible' benefices, even though they had obtained dispensations. Such a clerk was, within one month

[1] For a full historical account of the law see Hinschius, Kirchenrecht, iii. 243 ff.
[2] Conc. Lat. IV. c. 29; c. 28, X. 3, 5.
[3] c. un. in Extrav. Joan. XXII. 3; c. 4 in Extrav. comm. 3, 2.

after notice of this constitution, to resign all but one of his benefices, or else they were all to be vacant *ipso iure*. There were prospective besides retrospective clauses, and finally there was a clause in which we may, if we like, discover the legislator's main motive. All the benefices vacated by the 'cession' of the pluralists were 'reserved' to the pope, or, in other words, it was for him to fill the vacancies. This constitution was no idle word in England. In the next year we can see Pope John busily at work collating clerks to English benefices which have been vacated by the force of *Execrabilis*[1]. The English king was weak and worthless, and apparently the Holy Father was allowed to have his way.

A little later Edward III was on the throne, and the outcry against 'provisors' was swelling. At this moment some of the king's lawyers seem to have caught at the idea that two could play at *Execrabilis*, and that, while the 'reservation' was studiously disregarded, the main provisions of the bull might be enforced with advantage. It will be remembered that the amount of patronage that fell to the king's share was very large. To say nothing of the churches that were all his own, he exercised the patronage of infants who were in ward to him, and also the patronage annexed to bishoprics that were vacant. So any measure which emptied churches might do him a good turn and enable him to pay his servants.

In 1335 the king brought a *Quare impedit* against the bishop of Norwich for the deanery of Lynn[2]. The king stated in his count that John, late bishop of Norwich [that is John Salmon who died in 1325], had conferred the deanery on one Master Roger of Snettisham, who was already parson of the church of Cressingham, and who continued to hold both benefices for more than a month after his installation in the deanery, 'per quod per constitucionem de pluralite predictus decanatus vacavit ipso iure,' and remained vacant until the temporalities of the bishopric of Norwich came into the hand of Edward II upon the death of bishop John. To this declaration the bishop demurred in that polite form in which we demur to the pleadings of kings. He said that he did not understand that the king desired an answer to the said declaration, 'for therein he does not allege that the said deanery was vacant *de facto* in such wise that this Court might take cognizance of the vacancy, but merely alleges that it was vacant by the constitution against plurality, which does not fall within the cognizance of this

[1] Calendar of Papal Letters, ii. 172–182.

[2] De Banco Roll, No. 305, Hilary 10 Edw. III. m. 214 dors. An earlier stage on De Banco Roll, No. 303, Trinity 9 Edw. III. m. 236. I have to thank Miss Salisbury for searching and making extracts from these rolls.

Court.' So the bishop craved judgment. The king replied that by the constitution against plurality the deanery must be adjudged to have been vacant *de iure* just as though the dean had been deprived thereof by sentence. So the king craved judgment. Here the record ends, and no more of the case has been found.

So much from the roll. In the Year Book we have discussion [1]. After some little fencing over the question whether the king ought to say that a 'bishopric,' or merely that the 'temporalities of a bishopric' are in his hand when there is no bishop, the serjeants come to the main matter. For the bishop it is said, 'Sir, you see how the king takes as the cause of the voidance the constitution touching plurality, and shows nothing that lies in any fact which would give cognizance to this Court, such as resignation, privation, death or succession.' Parning, who is arguing for the king, replies, 'The constitution touching plurality was made by a general judgment that all should be deprived who held their *beneficia curata* for more than a month after the constitution, and this binds them more firmly as regards privation than a judgment that some certain person should be deprived, for the one might be afterwards annulled upon appeal; not so the other.'

The Year Book, like the roll, tells of no judgment. Probably the king and the bishop came to terms. We can, I think, see that the king's advocates had rather a difficult course to steer. They were proposing to enforce a papal constitution directly and without any certificate from the English ordinary. What might they not have on their hands if they once began to administer the 'extravagants' of Avignon? Parning's argument seems to be explicable by the retrospective character of *Execrabilis*. This, he urges, is 'a general judgment.' If a particular judgment of deprivation were given against a clerk and were certified to this Court, you would hold that the benefice was vacant. Well, here is a general judgment and one that is subject to no appeal. That the constitution in question was *Execrabilis* and not one of the earlier decrees (for example *De multa*) would, I believe, be clear even from this case, because of the mention made of the one month which is given to the pluralist for the resignation of his superabundant benefices. Happily, however, this is put beyond all doubt by the enrolled record of the next case, though it is left dubious in the Year Book.

In 1351, John of Gaunt, on behalf of the king, brought a *Quod permittat* against Simon Islip, archbishop of Canterbury, for a presentation to the church of Wimbledon in the county of Surrey [2]. The king's declaration stated that Robert of Winchelsea, archbishop

[1] Y. B. 9 Edw. III. f. 22 (Trin. pl. 14); Y. B. 10 Edw. III. f. 42 (Hil. pl. 3).
[2] De Banco Roll, Mich. 25 Edw. III. m. 41 dors.

of Canterbury, being seised of the advowson, collated John of Sandale in the eleventh year of the reign of Edward II, and that because Pope John, in the second year of his pontificate (Sept. 5, 1317–1318) and the ninth year of the said reign (July 8, 1315–1316) [1], made a certain constitution called *Execrabilis*, to the effect that no clerk should occupy two *beneficia curata* beyond one month after the publication of the said constitution without being deprived *ipso iure* of both benefices, which constitution was published in the said year of Edward II, and because the said John of Sandale occupied the church of Wimbledon and various other churches [which are named] for days and years after the said publication, the said church of Wimbledon by virtue of the said constitution became vacant, and remained vacant until the temporalities of the archbishopric came into Edward II's hands by the death of archbishop Robert, and so the right to present a clerk pertained to Edward II, from whom it descended to the now king.

Pausing here for a moment, we may remark that to us who are blessed with books of reference, the king's story is obviously false, for Robert Winchelsea was dead, and Walter Reynolds had succeeded him at Canterbury some time before the publication of *Execrabilis*. But we must not allow this brutal matter of fact to spoil a discussion of matter of law. We learn from the Year Book [2] that the counsel for the archbishop were at first inclined to demur. The king, they said, founds his action on a matter that does not lie in the cognizance of this Court, and we do not think that this Court will take cognizance of a matter which ought to be pleaded in Court Christian. This was a very intelligible line of defence: it is not for the Court of Common Pleas to enforce directly a law against plurality. However, we are told that the archbishop's counsel dared not demur at this point, since if the Court was against them they would be allowed no other defence. So they, as both the report and the record show, traversed the king's statement that the church of Wimbledon fell vacant while the temporalities of the archbishopric were in the hands of Edward II. This is the plea that is upon the roll, where no notice is taken of the abortive demurrer. A jury was summoned and gave the king a verdict. The jurors said upon their oath that after the publication in England of the constitution called *Execrabilis*, for some six weeks and more, John of Sandale held the church of Wimbledon and certain other churches that they named, that thereby the said church became vacant, and that it remained vacant until by the death of archbishop Robert the temporalities of the archbishopric came into the hands of Edward II.

[1] The slight discrepancy in the dates will be noticed.
[2] Y. B. 26 Edw. III. f. 1 (Pasch. pl. 3).

Judgment was given that the king should recover his presentation and that the archbishop was in mercy [1].

On the roll this judgment is followed by a remarkable writ dated April 22, 1352. Much to our surprise the king confesses that he is now informed that the title to the presentation which he had successfully urged was feigned and untrue (*fictus et non verus*), and that the church did not become vacant while the temporalities of the archbishopric were in his father's hand. Therefore he revokes his presentation of a certain William of Cheston, declares that the judgment is not to be enforced, and forbids that the archbishop should be further molested. This writ comes to us as a surprise, for though, as already said, we happen to know that the jurors' verdict must have been false when it supposed that Winchelsea's death occurred after the publication of Pope John's constitution, still we are hardly prepared to see Edward III quietly resigning the fruits of a judgment. The interesting feature of the case, however, is the proof that the Court of Common Pleas was prepared to put in force one half of the notorious extravagant, and this without requiring any sentence of deprivation pronounced by an English ecclesiastical court. The pope had said that in a certain event a benefice was to be void; void therefore it was, for the pope had power to make laws and even retrospective laws against pluralism. On the other hand, no word is said in record or report of the other half of the bull, for a 'reservation' is plainly an attempt to touch that right of patronage which is a temporal right given by the law of the land, and such an attempt is *ultra vires statuentis*. The pope's law may turn an incumbent out, but, the church being vacant, the patron can exercise his right of presentation. A very pretty plan! But what would the English prelates say?

We can now understand a petition that the clergy presented to the king in the Parliament of 1351 [2]. Probably it was occasioned by the action directed against the archbishop. 'May it please you to grant that henceforth no justice shall hold plea of the vacation of any benefice of Holy Church by reason of insufficient age, consecration as bishop, resignation, plurality, inability, or other voidance *de iure*, for no such avoidance lies or can be in the cognizance of lay folk; but if our lord the king desires to take advantage of any such avoidance *de iure*, let a mandate be sent to the archbishop or bishop of the place where the benefice is, bidding him inquire touching this matter in the due manner according to the law of Holy Church as is done in the case of bastardy.' In

[1] See also the case against the bishop of Worcester, Y. B. 24 Edw. III. f. 29 (Trin. pl. 21).

[2] Rolls of Parliament, ii. 245.

answer to this prayer the king willed that if title by avoidance came in plea before his justices, whereof the cognizance appertained to Court Christian, the party[1] should have his challenge, and the justices should do right. This somewhat enigmatical response was converted into a statute[2]. 'Whereas the said prelates have prayed remedy because the secular justices accroach to themselves cognizance of the vacation of benefices, whereof the cognizance and discussion belongs to the judge of Holy Church and not to the lay judge, the king wills that the justices shall henceforth receive the challenges made or to be made by any prelates of Holy Church in this behalf, and shall do right and reason in respect of the same.' This statute, like many others which touch the relation of the temporal to the spiritual tribunals, looks very much like an 'As you were.' Bishops and justices must fight the matter out: both parties should be reasonable; but the king does not like to decide their quarrels.

I believe that the justices held their ground. The traditional law of Coke's day was that 'by the constitution of the pope' if a clergyman accepts a second benefice 'the first is void *ipso iure* and the patron may present if he will,' although no sentence of deprivation has been passed[3]. In other words, the secular court would take direct notice of the ecclesiastical rule that avoids the one *beneficium curatum* when the other is accepted. Coke thought that the rule in question was the outcome of *De multa*, the canon of the Lateran Council of 1215. That canon would in fact have justified what was done by our Courts of common law, but when Coke proceeds to say that this is the constitution that is referred to in the cases of Edward III's day, he is mistaken. He had seen the Year Books, but did not know that the roll spoke expressly of Pope John and his *Execrabilis*.

Having mentioned John of Sandale and pluralism, it may be worth our while to observe that this distinguished clerk, while working his way upwards through the royal chancery towards the chancellorship of the realm and the bishopric of Winchester, had become a pluralist of the deepest dye. He, when yet a subdeacon, obtained the chancellorship of St. Patrick's at Dublin, the treasurership of Lichfield, seven churches in seven dioceses, and three prebends at Wells, Howden and Beverley, and had leave from the pope to accept additional benefices to the value of £200[4]. The requisite dispensation he had obtained from Clement V at the instance of

[1] The statute suggests that the word should be *prelate* not *party*.
[2] 25 Edw. III. stat. 3, cap. 8.
[3] *Holland's* case, 4 Rep. 75 a; *Digby's* case, 4 Rep. 78 b.
[4] Register of Papal Letters, ii. 9, 27, 88, 119.

the king of England. This is a good illustration of that viciously circular process from which an escape was impossible until the pope's claims were utterly denied. The king's 'civil service' must be maintained, but, such is the nation's impatience of taxation, that it can only be maintained out of the revenues of the churches. The only method, however, by which these revenues can be secured for such an object consists in papal dispensations. Therefore the pope's power to dispense with the laws that he has ordained must be acknowledged. And then when the pope tries to make profit for himself out of the powers that we allow to him, we begin to complain and to pass statutes of 'provisors' that we dare not enforce, lest the king's 'civil service' should break down. We cannot get on with the pope, and yet we cannot do without him, for rightly or wrongly we believe that he can legislate for the church. It is an intricate and is not a pleasant tale; but it deserves telling, and yet will never be told in full until the Year Books have been properly edited.

F. W. MAITLAND.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

A Complete Manual of Canon Law. By OSWALD J. REICHEL. Vol. I. The Sacraments. London: Hodges. 1896. 8vo. xv and 416 pp.

THIS, though a learned and an interesting, is also, at least for lawyers and students of history, a perplexing book. It is not a manual of English ecclesiastical law; it is not a rival for the familiar 'Phillimore,' of which we are now welcoming the second edition. It is not a history of the Canon law; and this we regret, for Mr. Reichel has shown both here and elsewhere that in many respects he is admirably qualified to write such a history and to give us something better than the very meagre and somewhat antiquated summaries which we find in our English books. Again, we have not here a statement of various systems of Canon law. There is no reason why the law of various churches, or (if the phrase be preferred) the law of various branches of the Church, should not be brought within two covers. We can well understand, for example, that Friedberg's *Lehrbuch des katholischen und evangelischen Kirchenrechts* is a very useful book, and deserves its fourth edition, though on one page we find what is distinctively *katholisch*, and on the next what is distinctively *evangelisch*. But so far as we can understand it, Mr. Reichel's Canon law is one and indivisible, or, in other words, it is a system which, taken as a whole, is not being enforced by any court. This bit of it may be enforced by a court at Rome, that bit of it by the courts of the Anglican Church; but the whole is not being enforced by the public authority of any Christian community. It seems to be some sort of canonical *ius gentium*, and to be conceived as the law which is (or ought to be) common to all such Christian communities as Mr. Reichel will allow us to regard as branches of a catholic church. Consequently it is often vague and indefinite law, for it is in truth a canonical *Naturrecht*.

There is no reason why a man should not endeavour to put English and American (temporal) law between two covers. But an attempt to state a system of law that is common to both countries would lead to an absurdly unsatisfactory result, especially in the constitutional sphere. We must make up our minds to talk either of Queen and Parliament, or of President and Congress; we cannot talk of both in the same breath; and a *tertium quid* which was neither House of Lords nor Senate, but the element common to the two, the abstract Second Chamber of the Pan-Anglo-American constitution, would be in truth a figment of our own brains. And if any of us are sighing for a Pan-Anglo-American 'reunion,' assuredly we shall not hasten its day by the postulation of a constitutional 'law' that is neither English nor American, but both. The fact of disunion should be faced, for, if it be not, our law will be the law of fairyland.

A review of the selection of rules which Mr. Reichel has made is a task beyond our powers, for we have no clear idea as to the measure of authority that he would attribute to the various voices that in time past have spoken

in the name of 'the Church' or of some section thereof. Let us take marriage, for example. Mr. Reichel has much to say about this matter that is of interest. Much of it is sound and accurate. Now it would be pleasant to quarrel with him about the *affinitas tertii generis*, of which (p. 361) he seems to give a wrong example when he speaks of two brothers marrying two sisters. It would be pleasant to take exception to the following footnote (p. 331): 'Gratian, Caus. XXVII, Qu. II, Init.: Viri mulierisque coniunctio individuam vitae consuetudinem retinens, the latter words representing the Christian addition to a natural relation,' for Mr. Reichel is a Bachelor of the 'Civil' Law, and therefore knows that Gratian was borrowing from the Institutes, and should be careful to render to Caesar the words that be Caesar's. Really the Institutes Commissioners seem to have watered down the famous definition of Modestinus, because, with its talk about *ius divinum*, it looked a little too religious, and therefore too archaic; and was Modestinus a Christian? But this would be quarrelling about trifles and fiddling while Rome (or Canterbury) is burning. Such grave questions are open. To mention but one:—May a priest, can a priest, marry a wife? 'By the general law of the Church (to which the present English Statute Law is an exception), holy orders invalidate any after-contracted marriage' (p. 356). Are we to say then that according to the law of the English Church, the clergyman who, as he would say, marries a wife, does nothing of the kind, but commits fornication, for of course 'the present English Statute Law' does not proceed from 'the' or any Church? There is, however, some hope for our clergyman and his would-be wife. 'In this country not only is marriage allowed to all the clergy, collegiate as well as rural, by custom based upon secular legislation, but the custom has extended to bishops as well as to presbyters and deacons, and their marriage, and even their remarriage, is tolerated after as well as before ordination, for which there is no precedent elsewhere' (p. 275). This perhaps improves the good lady's position. She is not only an honest woman by 'the present English Statute Law,' but she is 'tolerated' 'by custom based upon secular legislation.' But what Church 'tolerates' her? Suppose that the 'presbyter' whom she married was one of those presbyters who are commonly called Roman Catholic priests: will his Church 'tolerate' her even 'in this country?' No, all this blurring and slurring is vain. Of two things one:—(1) 'The Church' has no law of marriage that is even moderately complete, or (2) 'The Church' has several antagonistic systems of matrimonial law.

Mr. Reichel's book has had the misfortune to fall into the hands of a reviewer who thinks that it is a castle (or a church) in the air, but who none the less sincerely admires the learning that has been spent upon its construction.

F. W. M.

A Digest of Anglo-Muhammadan Law. By Sir R. K. Wilson. London: Thacker & Co. 1895. 8vo. xxxii and 500 pp.

Amongst the many curiosities of legal history in India, nothing is more curious than the contrast between the development of the Hindu and the Muhammadan law. Whole chapters of Hindu law have been manipulated, extended, cleared of difficulties and reduced to order under the joint influence of British and Hindu lawyers; a large portion of modern Hindu law is what might be called 'judge made,' and this body of law is accepted willingly by Hindus, who have never shown any reluctance to submit their legal differences to the arbitrament of the British courts.

With the Muhammadans it is far otherwise. They have never taken kindly to our courts. They do not like to bring their private affairs before them. Consequently we know far less about the Muhammadan law than we do about the Hindu law; the conflicting authorities have hardly at all been reconciled by the final decisions of the Privy Council.

This is evident at once on turning over the leaves of Sir R. Wilson's book. Comparatively few decisions of the British courts are referred to, and constant doubts are expressed as to what view these courts would take in a given case.

A treatise, therefore, on Muhammadan law by so accomplished and experienced a student of it as Sir R. Wilson is very welcome. And, as far as I am able to judge, the author has executed his task with the skill and care which we should expect from him. Evidently much thought has been bestowed upon the propositions of law which form the digest; the authorities for and against these propositions are stated with clearness and candour in the notes, and I do not think a lawyer wishing to ascertain the view taken in India of any special point of Muhammadan law could do better than begin by consulting Sir R. Wilson's book.

A conspicuous feature of this book is its very great fairness. The criticisms are courageous, but they are sound, sensible, and acute. This is very useful; for it is most desirable that English people should know what sort of system it is that we administer in India under the name of Muhammadan law. They ought to know its advantages and its defects. This information can nowhere be so well obtained as from Sir R. Wilson's book. And by a perusal of this book the unprejudiced reader would, I think, see that the Muhammadan law, though far from being altogether bad, has some very serious defects; and whilst it is not so pure a system as Mr. Justice Ameer Ali would wish us to believe, it is not such a tissue of puerilities and obscenities as might be inferred from the last published volume of the Tagore Lectures, the author of which, strange to say, is himself a Muhammadan.

It is, I think, to be regretted that Sir R. Wilson, instead of adopting the usual form of a treatise, should have chosen the repulsive and inconvenient form of a digest. His choice was particularly unhappy in the present case, because we entirely lose by it the interest which attaches to the Muhammadan law from its history and from its frequent analogies with other systems of law. The comparison of its principles with the Roman law (by which it may have been directly influenced), the large importation into it of Arabian customs, the similarity of those customs to those prevailing in India and in Europe,—all this is scarcely alluded to.

I am aware that Sir R. Wilson adopted the form of a digest advisedly, and that he defends his choice in the Preface. He seems to have been influenced by the example of Sir James Stephen, whose object was to put the law in a form ready for codification. But the Muhammadan law as administered in India is not ready to be operated upon in this way. It cannot be made to fall into a series of abstract propositions the substance of which may be considered as finally settled. This is a condition of things which can only be arrived at after a large amount of discussion and a free interchange of views, such as is not likely to take place for a long time to come. But this is a minor point. The book is a very useful one notwithstanding.

W. M.

[The 'puerilities and obscenities' alluded to by the learned reviewer are inevitable in a system which endeavours to formulate rules of legal obligation

applicable to the most intimate relations of life. In Europe the canon law (not to speak of purely theological casuistry) did not wholly escape this danger.—Ed.]

Company Precedents. Part II. Winding-up Forms and Practice. By F. B. Palmer, assisted by F. Evans. London: Stevens & Sons, Lim. 1896. La. 8vo. lxxi and 790 pp. (30*s.*)

Not the least of Mr. Palmer's many merits is that he is eminently practical and to the point. In his Company Precedents, Part I, his aim is to see how what the commercial world wants can be done, to put it into legal shape and render it impregnable against the insidious attacks of the Court. He pauses now and again to discuss the correctness of judicial decisions, but as a draftsman he is concerned not so much with resolving knotty points of law as in pointing out the business bearing of cases and applying them. This excellent characteristic of practicality is as much in evidence in the present edition of the Winding-up Forms as in the Company Precedents. No one is better aware than Mr. Palmer that, in that prosaic proceeding known as winding up, what the ordinary person wants is not to assist in deciding nice points of law, not to have the honour of becoming a 'case,' but to get paid his debt, or to realize his security, or have his name struck off the list of contributories, or a misfeasance claim against him met successfully. These are matters which, in Lord Bacon's phrase, 'come home to men's business and bosoms,' and in these and such as these the practitioner is personally conducted along the rough and tortuous track by a guide of wide and varied experience. If it is a winding-up petition the practitioner is presenting, the numberless little points of form and practice are here collected for him. If he would prove his debt, the different kinds of debt are conveniently classified. If he would know whether he is a contributory or not, the cases pro and con are here in parallel columns, and, with these, inexhaustible store of forms. Lord Stowell used to say that dining lubricates business. It is certain that nothing lubricates legal business better than well-considered forms like Mr. Palmer's. A Bethell with the assurance of the newly-fledged barrister may draw a bill of exceptions by the light of nature, but, as a rule, forms drawn by the light of nature are anathema. They give infinite trouble to judges, to registrars, to chief clerks, to everybody concerned. It is a striking testimony to the value as well as variety of the forms in this volume that when the first edition appeared, about twenty years ago, it contained fifty forms only; to-day it contains considerably over eight hundred. The sapling has grown into a vigorous tree.

A considerable amount of space is given to voluntary winding up, and for a very good reason, that ninety per cent. of the companies that go into liquidation are wound up voluntarily, not a few, of course, for purposes of reconstruction. This topic again, reconstruction—and particularly that form of reconstruction represented by schemes of arrangement under the Joint Stock Companies Act, 1870—is fully dealt with, and as it is one on which the light of nature is dim and uncertain in the extreme, the advice given is especially welcome. Few, indeed, in these days can escape being drawn, in one capacity or another, as contributories or creditors or auditors or directors or debenture-holders, into the swirl of some sinking company, and all these will find Mr. Palmer's latest work invaluable as a 'tabula in naufragio.'

E. M.

A Treatise on International Law. By WILLIAM EDWARD HALL. Fourth Edition. Oxford: Clarendon Press. London: Henry Frowde and Stevens & Sons, Lim. 1895. 8vo. xxvii and 791 pp.

IT is unnecessary at this time of day to enlarge on the merits of the standard English treatise on international law. The present edition 'was throughout prepared for the press by the late Mr. Hall,' and its publication has been very carefully conducted by Mr. Beresford Atlay, Professor Holland prefixing a short preface. The qualities which gave the book its reputation, especially the practical sagacity of the author's views and the care with which he watched every event bearing on his subject and every tendency to the modification of opinion at home or abroad, mark this equally with the previous editions. The suddenness of the regretted author's death allowed him to devote, to the last, his usual attention to his favourite study. And thus, although the book is just one of those which judicious editing may keep in use and up to the mark for a long period, the present edition will always have an especial value as embodying the last thoughts of a man who combined in a remarkable degree the character of a scholar with that of a man of the world.

J. W.

The Ecclesiastical Law of the Church of England. By the late Sir ROBERT PHILLIMORE, Bart., D.C.L. Second Edition by his son, Sir WALTER GEORGE FRANK PHILLIMORE, Bart., D.C.L., assisted by CHARLES FUHR JEMMETT. London: Sweet & Maxwell, Lim. and Stevens & Sons, Lim. 1895. 2 vols. 8vo, paged continuously. lxxxvi, viii and 1883 pp. (£3 3*s*.)

PHILLIMORE'S Ecclesiastical Law is a book so well known that when we say that the new edition preserves, with improvements, the form and characteristics of the former edition, no further description is required. We need hardly remind our readers that it is a work of a rather discursive character, and is by no means limited to the purposes of a practising lawyer's manual; and this character, while it greatly adds to the interest of the book, must be our excuse for dealing in this notice with a few points, the importance of which may be thought by superficial observers to be more speculative than practical. On p. 96 we find: 'Holy orders being indelible, the Church is careful not to allow idle persons or those wholly unprovided with the means of supporting themselves to be ordained. She requires what is technically called a title.'

The doctrine of the indelibility of holy orders belongs to a class of ecclesiastical doctrines, comprising also that of apostolical succession, the colour of the devil, the infallibility of the pope, and the indissolubility of marriage, which, however indisputably true in themselves, rest more upon effective assertion than on historical investigation. Indeed, historical investigation shows that few doctrines of this class have at all times been held as indisputable truths. The indelibility of holy orders is an instance in point.

The passage we have cited is found also in the first edition of Phillimore's Ecclesiastical Law, and (with the exception of the opening words. 'Holy orders being indelible') is in effect found in Burn's Ecclesiastical Law, and in Gibson. By adding these words Phillimore surely implies that the indelibility of holy orders is the reason why the Church of England requires

a title for ordination. This is more than Burn and Gibson knew, and if the statement is based on some authority of intermediate date, we are not told where to find it. Of the authorities to which we are in fact referred, one indeed seems decidedly opposed to the theory of indelibility, and is almost recognized by Gibson (i. 141) as being against it. When the indelibility of orders became a truth to be maintained, the commentator-canonists had to explain away inconvenient texts; and the method they adopted was to suggest that 'ordinatio irrita habeatur,' and phrases of that kind, meant nothing more than that the party was suspended from the exercise of his powers, but not deprived of them. Under these circumstances we may be justified in hoping that the next edition of Phillimore will give us the authority for holding that the indelibility of holy orders is the basis of the necessity for a title.

Our author commits himself to the statement that the rite of Confirmation is founded on the apostolical practice and precedent recorded in the Acts of the Apostles, viii. 14–17. Without presuming to offer any opinion on the truth of this statement, we feel that it is hardly the office of a law-book to be so dogmatic, and that it would have been better to follow the example of Benedict XIV, Instit. Ecc. vi. 5, 'Eam disputationem Theologis relinquimus, utrum id Sacramentum tunc primum [Salvator] induxerit, cum sanctissimas manus super puerorum capita imposuit; utrum etiam illud constituerit non quidem administrando, sed facta solum Apostolis promissione, ut ex S. Ioanne deprehenditur "Si non abiero, Paracletus non veniet ad vos; si autem abiero, mittam eum ad vos." Denique utrum in ultima coena id evenerit; vel cum Apostolis inquit "Accipite Spiritum Sanctum"; an vero die Pentecostes, cum Spiritu Sancto caelitus demisso confirmati fuerunt: an postquam a mortuis excitatus, quadraginta dierum spatio cum ipsis versatus fuit.'

Our author therefore here throws over the Roman Canon Law altogether; and he is in a position to do so, because the Roman Catholics hold Confirmation to be a sacrament, and are consequently under the obligation of discovering that it was ordained by the Founder himself; whereas Anglicans, who do not consider it to be a sacrament, have a freer hand. But from the fact that our author introduces his statement without any qualification, one might conclude that no other explanation of the origin of this rite was admissible in the Church of England. This we apprehend would be an error, and possibly a heresy.

We still find (p. 922) the Court of Audience mentioned as a distinct court in which the primates once exercised a considerable part of their jurisdiction, though now fallen into desuetude. It is a very mysterious court, whose existence is more a matter of faith than of history. The only really satisfactory authority on the subject seems to be the late case of the Bishop of Lincoln, in which it appears to have been decided that the court then sitting was *not* the Court of Audience. The curious thing is that Lindwood himself seems to have tried to lay the same spectre, for he writes (Lindw. 278) 'Nec reperies in toto corpore iuris canonici in aliquo textu mentionem factam de Auditore causarum curiae alicuius archiepiscopi, sed quod post ipsum Archiepiscopum quarumcunque causarum in foro suo iudiciali cognitio, examinatio, et terminatio pertinere debent ad eius officialem generalem.'

We have no doubt that the present edition will enjoy a popularity as great as that of its predecessor, and as well deserved.

Negligence in Law. By THOMAS BEVEN. Second Edition. Two Volumes. London: Stevens & Haynes. 1895. La. 8vo. cxci, 1779, 1970 pp. (£3 10*s*.)

ALTHOUGH these volumes are nominally a second edition of the author's Principles of the Law of Negligence, they form substantially almost a new work, since the arrangement is altogether different from that previously adopted, and nearly half the contents are new, while much of the remainder has been considerably modified.

The work is divided into seven books, the arrangement of which flows directly from the author's statement of the characteristics of negligence in law. After an instructive criticism of numerous definitions of the term which have been attempted, he concludes that it is a hard matter to define, and contents himself with a statement of its 'ingredients,' namely, 'There must be (1) a legal duty to exercise control, and (2) a failure in the exercise of the control necessary in the circumstances of any particular case. Where these two elements are found, a case of negligence in law exists.' The term control is used here in a very wide sense, since it includes not only control over property, but also control over oneself. And hence the following division of the subject-matter, based on a classification of the matters over which control must be exercised:

I. A general duty directly arising out of the constitution of society (Book II, Authorities specially constituted for exercising Control).

II. A special duty arising from the free will, or from the exigencies of particular men or particular classes; which head of special duty is again divided into—

(i) The most general relations in which a man is called on to exercise control, namely,

(*a*) Where he has the control of property (Book III, Duty to exercise Control over Property);

(*b*) Where he personally comes into contact with others, and that either directly or through the intervention of others (Book IV, Duty to answer for One's Own and Others' Acts).

(ii) The special control which a man has to exercise is referable to the terms of the various species of contracts into which the circumstances of his life are the occasion of his entering (Book V, Bailments; Book VI, Skilled Labour; and Book VII, Unclassified Relations, as Partnership, Trusteeship, Banking, and Estoppel).

Notwithstanding the author's misgivings, it appears to us that it is possible to frame a definition of negligence in fairly comprehensive terms which will express with tolerable precision the character and scope of this head of obligation; as, for instance, 'Actionable negligence is the unintentional breach of a duty to take care in the exercise of one's rights and duties, proximately producing damage to a person entitled to claim the observance of that duty.'

The arrangement of the various classes of cases which illustrate and enforce the general doctrine is a matter of subordinate importance, and if the classification adopted by the author wears a somewhat philosophic air, at any rate it enables us perhaps as well as any other to find our way through the masses of cases.

The author's treatment of the difficult subject of contributory negligence is excellent. Where the circumstances out of which the injury ultimately arises form a series of acts or events, the rule is that the party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence

of his opponent, is considered solely responsible for it, no matter how long the series. Where the circumstances are practically concurrent, the question is, whether, as between the two parties, the injury was due solely to the defendant's negligence. These points are well brought out, and illustrated by a full discussion of all the principal cases. The same chapter contains an able and instructive criticism of those cases where a person is held not responsible for an act done under sudden impulse, and hence not disentitled to recover, notwithstanding that his physical act has contributed to his injury. Where the impulse arises from terror produced by the negligent act of the defendant, it may fairly be said that the latter is alone responsible for the incapacity to judge calmly which leads to the plaintiff's improvident act. The cases where the injury is incurred in an effort to preserve human life are far more difficult to bring within any principle. The author states the problem very clearly: 'The justification of the act is that the negligence of the railway company, working through feelings akin to those which prompted the rash leap in *Jones* v. *Boyce*, has caused an act that is either instinctive or obligatory. . . . If the act of the deceased were instinctive, it comes under the class of cases to which we have already alluded; if it were deliberate, its justification must be sought on some such ground as the existence of a duty cast on the deceased by reason of the default of the defendants.'

It is almost impossible in the short space of a review to do justice to such a work as this. It is, in fact, a cyclopaedia of the law connected with negligence. The industry of the author has been truly extraordinary; and it is not too much to say that he has overlooked no point of importance connected with his subject. If his style is somewhat diffuse, it is probable that the practitioner, who generally consults such a work for the purpose of exploring some small corner of the law, will readily forgive this in consideration for the completeness, the accuracy, and the soundness of judgment which characterize the work as a whole.

One feature of the work is especially remarkable, namely, the very extensive use that has been made of authorities outside the English law, especially Scottish and American cases, and the Corpus Juris Civilis. Indeed, from this point of view the book may well claim to rank as a valuable work of comparative jurisprudence without forfeiting its claim to utility as a practical text-book.

A Treatise on the Law of Evidence as administered in England and Ireland; with Illustrations from Scotch, Indian, American and other Legal Systems. By His Honour the late Judge Pitt-Taylor. Ninth Edition. (*In part re-written.*) By G. Pitt-Lewis, Q.C. Two volumes. London: Sweet & Maxwell, Lim. 1895. La. 8vo. ccxlii, cciv, and 1234 pp. (£3 3*s.*)

Mr. Pitt-Lewis is of opinion that an editor of such a book as 'Taylor on Evidence' 'must be bold,' and he has therefore materially shortened his text. He makes up for it in the index and tables, however, for the ninth edition contains altogether only twenty-four pages less than the eighth. The reduction, which he asserts to be of about one-fourth in bulk (of the text), has been effected by omitting obsolete or immaterial statements, and pruning —apparently with some severity—Mr. Pitt-Taylor's 'rhetoric.' Beyond the ordinary labours of bringing a standard work into accordance with recent decisions, the most important alteration introduced by Mr. Pitt-Lewis is, we think, his omission of any names of reports in citations of cases in foot-

notes. The name of every case has, as it ought to have, the date of its decision appended, and sometimes the name of the judge, but for the references it is necessary to consult the table of cases. The motive of this departure from ordinary practice is to save the repeated printing of long strings of references, constantly half a dozen or so in number. In our judgment this solution of the difficulty in not quite satisfactory. The reference is an essential part of the authority relied upon, and at least one reference ought, in our opinion, to accompany every mention of a case. The additional labour for the reader of being separately referred for every case to the table of cases is considerable, and seems to us to outweigh the advantage gained by economy of printing. Probably the best compromise of the difficulty is to give one reference in the text or foot-note, and that to the most authoritative report—in all modern cases to the Law Reports—and to give all other references in the table.

Mr. Pitt-Lewis refers in his Preface to the 'necessity for the amendment of the Law of Evidence in Criminal Cases, by permitting accused persons and their wives and husbands to give evidence,' as being a matter upon which 'the great body of English lawyers' are decidedly 'agreed.' He would have done well to add that this agreement is especially conspicuous among those lawyers who have not, during the last eleven years, been constantly engaged in trials of persons of whom about twenty per cent. are competent witnesses and the others are not. Among lawyers who have been so engaged, who alone can judge by experience of the 'necessity' of altering the general rule on the subject, there is no considerable preponderance of opinion in favour of the alteration—if indeed the preponderance is not the other way. It is to be hoped that before the change is resolved upon, some opportunity will be taken of ascertaining the opinions of this comparatively small body of men. No doubt the opinions of Chancellors, Chief Justices, and so forth are worth more, *ceteris paribus*, than those of puisne judges and stuff-gownsmen; but when the views of the latter are founded upon an actual experience now of some duration, and those of the former upon more or less remote analogies, it seems a pity to neglect this source of information as to what are the practical consequences of making prisoners witnesses.

The Law of Copyright. By Thomas Edward Scrutton. Third Edition. London: W. Clowes & Sons, Lim. 1896. 8vo. xxiv and 313 pp. (15*s.*)

Mr. Scrutton's excellent book holds its own in a third edition as being the most concise, complete, and accurate treatise on a subject full of difficulties. The following observations in the Preface deserve the greatest publicity, and ought to be considered by our heads of departments:—'But hardly a copyright case comes into Court, hardly a copyright question comes before counsel for opinion, which does not emphasize the necessity for a thorough revision and codification of the numerous and ill-drafted Acts which constitute the Copyright Law of England. The Copyright Commission urgently recommended this in 1878, but we seem after eighteen years no nearer the desired haven. Is it too much to hope that a strong Government, with time to spare for unambitious but useful legislative reforms, may do something practical to assist the literary workers of the empire?'

A clear account will be found in this edition of the rather confusing series of 'Living Pictures' cases, and the Canadian copyright question (soon, we hope, to be settled) is touched on in a note, with a reference to the latest parliamentary papers on the subject.

The Law relating to Literary Copyright and the Authorship and Publication of Books. By DANIEL CHAMIER. London: Effingham Wilson. 1895. 8vo. xvi and 159 pp.

THIS is upon the whole a useful and a serviceable book, strictly limited, as its title shows, to literary copyright. The arrangement is not very good, but the index is comprehensive, and enables one to turn readily to any point which is needed. The decisions cited are well 'up to date,' but there is too great a tendency to cite Scottish and American cases as if they were of binding authority. It is not correct to lay down broadly, as Mr. Chamier does, that for a literary work to be entitled to the enjoyment of copyright it must be 'of value as literature.' How many books are there published every week which fail to meet this requirement? Mr. Chamier's chapter on agreements and transactions relating to literary works will be useful alike to lawyer and to layman, and he deals with the relations of parties arising out of the publication of books in a way which should be found valuable. But his chapter on International Copyright is not so satisfactory. It is a mistake to say that Austria has accepted the Berne Convention: the reference given is to a copyright convention between Austria and Great Britain only. Nor is it correct to say that prior publication in countries to which the Berne Convention does not apply precludes copyright in this country, as this is in many cases secured to countries outside the Union by separate conventions. Mr. Chamier may be trusted, but not trusted implicitly, or with blind faith.

Die Geschichte des Urheberrechts in England mit einer Darstellung des geltenden Englischen Urheberrechts. Von ALBERT OSTERRIETH, Secretär der Association littéraire et artistique internationale. Leipzig: C. L. Hirschfeld. 1895. 8vo. xiv and 221 pp. (6 marks.)

THIS is the best history of the English law of Copyright which has yet appeared. The English writers who have dealt with the subject have in the main been content with what is to be found in the judgment of Willes J. in *Millar* v. *Taylor*, 4 Burr. 2303; the present author, not satisfied with this, has gone to the original sources of information, of which he gives a list. His examination of these leads him to conclude that the practice of the Stationers' Company and the various Star Chamber measures for the regulation of the press (of which a very full account is given) led naturally to the acceptance by the Courts of the theory that an author has a right at common law to the products of his own labour. This was the substance of the judgment in *Millar* v. *Taylor*, and it is undoubted law as regards unpublished manuscripts, though not put on quite so broad a ground. But the doctrine has never been accepted by either branch of the Legislature, as appears from the judgments in *Donaldson* v. *Becket* (2 Bro. P. C. 129) and *Jefferies* v. *Boosey* (4 H. L. C. 815), and from the various Copyright Acts which seem to regard copyright as a special statutory power given to an author to interfere with the rights of others to reproduce this work. In the want of recognition of this principle Herr Osterrieth finds the principal cause of the imperfections which have made our copyright law the scorn of every one (whether Englishman or foreigner) who has ever studied it. We should be more disposed to find it in ignorance of the actual conditions of literary and artistic production combined with bad draftsmanship. It is much to be regretted that the author's ignorance of English matters outside his particular subject has led him to present us with such monstrosities as

the 'Court of Lords' or the theory that the Berne Convention is part of the English law by itself, and not only as forming part of an Order in Council, which is itself limited by the Act of Parliament under which it is issued. But this last is a common error of foreign writers. The book must be used with caution, on account of the numerous typographical errors to which allusion is made in the preface.

Registration of Land or Registration of Title. A paper addressed to the Right Hon. the Lord Chancellor. By JAMES EASTWICK, of Lincoln's Inn. London: Stevens & Sons, Lim. 1896. 8vo. 59 pp.

THIS pamphlet contains much matter worthy to be considered by those who wish to reform the law relating to the transfer of land. The author points out very clearly some of the defects in the present system of registration under the Act of 1875; he shows how readily that system lends itself to forgery, and the difficulty it gives rise to respecting boundaries. He points out the salient error in the bill promoted by the Incorporated Law Society, viz. that a purchaser who takes by a conveyance from an estate owner is to take free from all equities, whether he has notice of them or not.

The author considers that 'the idea that title means a right against all the world' is the root of all the difficulties and defects that he points out in the present system of registration. 'Title in the sense in which the word is used in the law of vendor and purchaser is not a right, still less a right against all the world; it is a means of proving a right. To give it any wider meaning than this is to confuse the evidence with the judgment; to make it mean a right against all the world is not only to confuse the evidence with the judgment, but further to give a judgment, which ordinarily is and can only be a judgment *in personam*, the effect of a judgment *in rem*.'

The author's own scheme is to enable existing deeds to be registered; to cause all new documents relating to land to be inoperative till registered, to be void unless registered within a prescribed period, and to take priority according to date of registration. Registration to be notice to all the world; no person to be affected by notice of any deed, &c., or lien, &c., executed or arising after the new scheme comes into operation, and not appearing on the register. Registration is to be effected as follows: (1) Instruments may be prepared in any form and engrossed or printed in any shape, but two copies at least of any instrument to be registered are to be prepared in proper form; (2) The person leaving the deed for registration is to pay all duties and fees and to enter the particulars of the deed in the proper form in a book kept at the office. The Registrar is to examine the copies with the deed, to mark the deed and copies with the number of the entry, to mark every parcel in his map and enter the names of the parties in an alphabetical list, to remit the deed to a central office for filing, to retain one copy for reference in his own office, and to deliver out the other for use. We do not think it necessary to give further details of the author's system of registration. Without discussing the merits of registration of deeds, we may point out that the system suggested by the author will be very expensive. Making copies, examining copies with an original, cost money; we cannot help thinking that, unless the costs of registration are to be borne by the public, all persons who deal with land will have, if Mr. Eastwick's system comes into operation, a very unpleasant addition to their solicitors' bills.

The author makes a suggestion which requires careful consideration, as it appears to have in it the germ of a system which might with advantage be applied to any amended system of registration of title. He proposes that a person claiming under a registered document should be capable of having his title certified after official examination, and that every certified title is to be accepted on a subsequent sale as good in the absence of evidence to the contrary.

The author points out that the difference between a certificate of title under his scheme and a registration with absolute title is that the former, being founded on documents taking effect solely *ex parte*, does not, in the event of fraud or error, prejudice third parties, while the latter does.

The author also proposes that private offices, as opposed to the State, should undertake to insure certified titles. Lastly, he proposes that boundaries should in certain cases be marked out by boundary stones. There may be some few cases where this would be convenient, but in the country, where boundaries are constantly, though very slowly changing, the compulsory use of boundary stones would, we think, be inexpedient.

It has been impossible within the necessary limits of space to do justice to Mr. Eastwick's pamphlet. We can only repeat that all who take interest in the reform of the law of Land Transfer ought to study it with attention. Even those who do not agree with his views will find that the mere fact of trying to refute them will tend towards rendering their own views more clear.

Recueil des Traités et Conventions conclus par la Russie avec les Puissances Étrangères, publié d'ordre du Ministère des Affaires Étrangères. Par F. DE MARTENS. Tome XI. *Traités avec l'Angleterre* 1801–1831. St. Pétersbourg. 1895. x and 492 pp.

THIS volume of the Russian official collection of Treaties, in course of publication under the editorship of Professor de Martens, of the University of St. Petersburg, is devoted to the period of Anglo-Russian relations which extends from the conclusion of the Navigation Treaty of 1801 to the international conventions for the Independence of Belgium in 1831. The agreements to which, during the interval, the Powers in question were parties, reach the respectable number of thirty-four. Professor de Martens' *modus operandi* is to introduce each document or group of documents by a detailed note embracing the diplomatic correspondence and negotiations which led to the agreement. Thus these notes form a sort of history from the Russian point of view of the diplomacy of the thirty years they deal with.

The armed neutrality was the first breach in a long traditional amity between the two states, and according to Count Worontzow, who stayed for twenty years in England and became *un véritable anglais*, the famous Empress had no idea that it was hostile to England. Whether the Count therein was right or wrong, he was the means of converting Alexander I to a sense of the desirability of a settlement with Great Britain, which would put the vexed question of contraband on a satisfactory footing.

The above-mentioned maritime convention resulted, and was the starting-point of a new lease of friendship till 1807. After the destruction of the Danish fleet, the consequent rupture with Russia and the reproclamation of the armed neutrality, it was only in 1812 that Great Britain and Russia were again joined in a common diplomatic act. At the Congress of Vienna no questions of maritime law were discussed, England having refused to submit such matters to a congress.

Except this subject of the rights of neutrals in time of war, the interval from 1807 to 1812 and a slight difference as to British intervention in Persia, the thirty years described are characterized by harmony of views between the two States on nearly all questions.

There is much original matter in the notes, which like the documents are printed in French as well as in Russian, the two texts being set out in parallel columns.

Among the many quotations the following passage from a despatch of Worontzow, describing Pitt, though scarcely within the scope of this Review, will be read with interest:—

'Cet homme joignait aux talents les plus extraordinaires la vertu la plus sublime, aux mœurs les plus pures le caractère le plus doux et le plus humain; pas la moindre teinte d'ambition, d'orgueil ou de vanité n'est jamais entrée dans sa belle âme; modeste, naïf, il paraissait être le seul qui ignorait tout ce qu'il y avait de grand dans son caractère. Jamais il n'a été homme de parti, mais toute sa vie était consacrée à sa patrie qu'il adorait. . . . Il a sauvé ce pays d'une banqueroute inévitable, il l'a sauvé d'une révolution, qui aurait été immanquable en 1792 et 1793, s'il n'avait employé toutes les ressources et la fermeté de son grand caractère pour s'y opposer. Il n'y avait qu'un Ministre aussi pur que lui et jouissant comme lui de la confiance nationale qui eût osé prendre les mesures de vigueur qu'il a développées. En un mot, comme homme d'Etat il n'a eu et n'aura jamais d'égal, et comme homme privé il honorait et embellissait la nature humaine.'

The King's Peace, a Historical Sketch of the English Law Courts. By F. A. Inderwick, Q.C. (Social England Series). London: Swan Sonnenschein. 1895. 8vo. xxiv and 215 pp.

Mr. Inderwick has drawn a bright little sketch of the history of the English Courts. If he has not in this book added much to the sum of human knowledge, that was not his intention. He has told his story pleasantly, and when it comes down to modern times he has told it accurately. We can hardly say so much of what he has written about the earlier middle ages, though even here when he errs he is usually in good company or what was once accounted such. The most curious slip that we have noticed in his work occurs when he is speaking of the would-be foundation charter of Westminster Abbey. 'The signatures,' he says (p. 32), 'are as follows: First the king signs EADPARD in a school-boy's hand and makes his cross.' Well, perhaps the forger of that charter was rather rash when he turned on his very best Anglo-Saxon majuscule to glorify the king's name; still he knew how to make a respectable w of the Old English kind, and never meant us to believe that a king had written his own name. We are not of those who invent apologies for monastic forgers; still we feel that 'school-boy's hand' is too severe. However, Mr. Inderwick's book is pleasant, and the pictures in it, though they come for the more part from well-known sources, increase its value.

The Law of Bills of Sale. By James Weir. London: Jordan & Sons, Lim. 1896. 8vo. xlviii and 386 pp. (20*s.*)

This is a useful book on a most difficult subject. Bills of Sale are principally regulated by the Acts of 1878 and 1882, and these Acts are directed to be read together; but the objects of the two Acts are quite different, and hence probably comes the existing confusion which puzzles

the public and embarrasses the Courts. The aim of the Act of 1878 is to protect traders from customers who may obtain credit by remaining in the apparent possession of property which they have really sold or mortgaged; while the object of the later Act is to protect small borrowers from their natural enemy, the money-lender. This distinction, which is of great importance in any attempt to interpret the Acts, is well pointed out by Mr. Weir in his introductory chapters. The book is clearly written, but a dive into its pages will convince the reader (if he requires conviction) that the law on the subject is in a state of confusion and perplexity which urgently calls for amendment. As it now stands, bona fide business transactions are often liable to be impeached, while most oppressive dealings are rarely checked by any provision, except perhaps by accident. We notice that *Peace* v. *Brookes*, reported in October last, is not only cited but fully stated (op. cit. p. 275), and in this respect as in others Mr. Weir's book seems quite up to date.

Medical Partnerships, Transfers, and Assistantships. By W. Barnard and G. Bertram Stocker. London: Stevens & Sons, Lim. 1895. 8vo. xi and 249 pp. (10*s.* 6*d.*)

This book will prove useful to medical men and solicitors in the country, where the subject with which it deals is of special importance. In one part of the book the law as to medical partnerships is treated by Mr. Barnard clearly and accurately; in the other, for which Mr. Stocker is responsible, convenient forms are given.

We have also received:—

A Selection of Leading Cases on Various Branches of the Law. With Notes. By John William Smith. Tenth Edition. By Thomas Willes Chitty, John Herbert Williams, and Herbert Chitty. Two vols. London: Sweet & Maxwell, Lim. 1896. La. 8vo. Vol. I, 830 pp.; Vol. II, 840 pp. (preliminary matter and indexes not paged). (£3 10*s.*)—The new editors have effected some cautious and useful reforms in the arrangement of this edition; they have added *Fletcher* v. *Rylands* to the principal cases, and have laid the ghost of *Waugh* v. *Carver*; and the notes are well posted up. We have observed only one approach to a mistake; at p. 97 of vol. ii. *Alton* v. *Midland Ry. Co.* is still cited as if it were an unshaken authority. *Taylor* v. *M. S. & L. R. Co.* is however duly cited at p. 202 of vol. i., though, in our opinion, hardly with adequate appreciation of its importance. In the next edition we should be glad to see references to some of the leading American decisions.

Ruling Cases. Edited by Robert Campbell. With American Notes by Irving Browne. Vol. VI. Contract. London: Stevens & Sons, Lim. Boston, Mass.: The Boston Book Co. 1895. La. 8vo. xxxiv and 912 pp. (25*s.*) —This volume deals with a subject complete in itself, that of Contract, and will be found a good collection of leading cases, though not so full as Mr. Langdell's or Mr. Finch's. We are still of opinion that the total omission of American cases from the text is a serious drawback, but this is a settled part of the scheme. The notes are good so far as they go; we should have liked them better if they had been more critical and less of a mere digest of results; but here again economy of space may have been thought the first thing needful.

Recollections of Lord Coleridge. By W. P. Fishback. Indianapolis and Kansas City: Bowen-Merrill Co. 1895. 8vo. 134 pp. ($1. 25).—This is

a prettily got up and pleasantly written little book, and may be commended to American readers. English lawyers would naturally find little new matter in it, and certainly they will not be surprised by the discreet statement that in the course of one case tried by Lord Coleridge in the author's presence 'his lordship nodded as if he were asleep.' The author certifies that on this occasion his lordship's summing up proved him to have been awake. Mr. Fishback is an admirer of Lord Coleridge to the point of reproducing almost too faithfully some of his prejudices against the British landed aristocracy, which were really, we conceive, survivals from the old-fashioned Liberalism of the Reform Bill period.

Every Man's Own Lawyer. By a Barrister. Thirty-third Edition. London: Crosby, Lockwood & Son. 1896. 8vo. xvi and 736 pp. (6*s.* 8*d.*)—In a notice of the last edition of this book (L. Q. R. xi. 204) several mistakes, some of them serious, were pointed out. Not one of them has been corrected. The editor, however, is satisfied that the glossary of legal terms containing these mistakes 'has proved a useful and acceptable addition.' It is not for the profession, at all events, to complain.

Comyns' Exercises on Abstracts of Title, arranged for the Use of Law Students and Articled Clerks. Fifth Edition. With an Introductory Essay on Assurances. By H. W. CHALLIS. London: Reeves & Turner. 1895. viii and 315 pp.—The appearance of a fifth edition leaves no doubt of the value of this little book to those law students and articled clerks to whose use it is devoted. But we must draw the particular attention of all law students, whether or not *eiusdem generis* with articled clerks, to the introductory essay. It contains a particularly lucid account of the history and operation of Fines and Recoveries in their character of assurances.

The Law relating to Particulars and Conditions of Sale. Second Edition. By W. F. WEBSTER. London: Stevens & Sons, Lim. 1896. La. 8vo. xliii and 531 pp. (25*s.*)—This book has entered on the course of growth in bulk which marks the career of useful text-books on practical subjects. Without very careful editing they break down under it sooner or later: but this book can well afford to grow yet awhile.

The Law of Husband and Wife. By MONTAGUE LUSH. Second Edition. By MONTAGUE LUSH and WALTER HUSSEY GRIFFITH. London: Stevens & Sons, Lim. 1896. 8vo. lxxix and 626 pp. (25*s.*)—The first edition of this book was fully and favourably noticed in L. Q. R. i. 129. In the Preface to this edition the editors state that they have corrected a certain number of errors that had crept into the first edition, and have endeavoured generally to bring the work up to date. The chapters on Separate Property, Restraint on Anticipation, and Contracts have been practically re-written.

A Selection of Leading Cases in the Common Law. With Notes. By WALTER SHIRLEY SHIRLEY. Fifth Edition. By RICHARD WATSON. London: Stevens & Sons, Lim. 1896. 8vo. lxiv and 619 pp. (16*s.*)—The editor of this (the fifth) edition of Shirley's Leading Cases 'has endeavoured to increase its utility as a book of reference for practitioners without rendering it less acceptable to the law student.' There is an increase of some sixty pages in the present edition, but no corresponding increase in the price.

Synopsis of Contemporary Reports, 1832–1895. London: Stevens & Sons, Lim. 1896. 4to. (5*s.*)—This Synopsis, issued in connexion with the Law Journal Reports, consists of three charts, one each of the equity and common law reports published between 1832 and 1895; and a third containing all the series of 'mixed' reports from 1866 to 1895. The charts

are strengthened with linen backs. A new feature is the use of red ink to show the continuation or discontinuance of a series.

The Students' Legal History. By R. Storry Deans. London: Reeves & Turner. 1896. Sm. 8vo. vii and 263 pp. (6*s.*)—The author begins by quoting the 'Mirror of Justices' (not 'of Justice' as he calls it) as an authority for Anglo-Saxon law and misdating it about a century and three-quarters. We have not had time to read any more before going to press.

Traité des Obligations à Primes et à Lots. Par Henri Lévy-Ullmann. Paris: L. Larose. 1895. 525 pp.—This subject has not the same interest for Englishmen as for continental readers. Those, however, who do happen to be interested in it, will find the matter ably and fully discussed, and the laws on the subject of the chief States of Europe carefully contrasted.

Précis de Droit International Public. Vol. II. Par R. Piedelièvre. Paris: F. Pichon. 1895. 588 pp.—We have already noticed the first volume of this work. The present volume treats of international differences and the modes of settling them, and contains an interesting appendix on the Pope in connexion with International Law.

A Practical Treatise on the Law relating to the Grand Jury in Criminal Cases, the Coroner's Jury and the Petty Jury in Ireland. By William G. Huband. Dublin: Edward Ponsonby. London: Stevens & Sons, Lim. 1896. La. 8vo. xxxi and 1176 pp.

The Practice and Forms in Winding Up Companies and Reconstruction. By His Honour Judge Emden. Fifth Edition. By D. Stewart Smith, assisted by Henry Johnston. London: W. Clowes & Sons, Lim 1896. 8vo. lxxv and 806 pp. (28*s.*)

A Treatise on the Law of Easements. By John Leybourn Goddard. Fifth Edition. London: Stevens & Sons, Lim. 1896. 8vo. xxxix and 605 pp. (25*s.*)

Select cases from the Coroners' Rolls, A. D. 1265–1413. (Selden Society Publications, vol. 9.) Edited for the Selden Society by Charles Gross. London: Bernard Quaritch. 1896. 4to. xliv, 132 and 159 pp.

A Digest of the Law of Libel and Slander. By W. Blake Odgers, Q.C. Third Edition. London: Stevens & Sons, Lim. 1896. La. 8vo. lxxxvi and 841 pp. (32*s.*)

Die Behandlung der Verbrechenskonkurrenz in den Volksrechten: von Dr. Hans Schreuer. Breslau: Wilhelm Koebner. 1896. 8vo. xii and 299 pp.

The Annual Digest, 1895. By John Mews. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1896. La. 8vo. xxxix and 15 pp. and 336 columns. (15*s.*)

The Law and Practice of Licensing. By G. J. Talbot. London: Stevens & Sons, Lim. and Sweet & Maxwell, Lim. 1896. 8vo. xxiv. and 367 pp. (7*s.* 6*d.*)

A Digest of the Law of Agency. By W. Bowstead. London: Sweet & Maxwell, Lim. 1896. 8vo. xxxvii and 394 pp.

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.
